FILED
No. 06-608 OCT 27 2006
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

LORRAINE G. GRACE, Individually and as Executrix of the ESTATE of OLIVER R. GRACE, GERALD I. WHITE, Trustee U/W MORGAN H. GRACE, for the Marital Deduction Trust, GERALD I. WHITE, Trustee U/W MORGAN H. GRACE for the Non-Marital Deduction Trust and GERALD I. WHITE, Trustee U/W MORGAN H. GRACE for the Generation Skipping Trust and GERALD I. WHITE, Trustee of the JOHN E. GRACE TRUST, individually and as stockholders of BRIGGS LEASING CORP., suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

*Petitioners,*

*- against -*

BANK LEUMI TRUST COMPANY OF NEW YORK, DAVID MACK, the ESTATE OF LEO V. BERGER, APEX MARINE CORP., HARVEY SCHWARTZ, PHYLLIS SEPE and SIGMUND KASSAP, Trustee of the LEO V. BERGER GRANTOR TRUST NO. 1 as Personal Representative of the ESTATE of LEO V. BERGER,

*Respondents,*

*(Caption Continued on Inside Cover)*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*- and -*

ROBERT ROSENSTOCK, ROBERT GENSER, EDWARD ROSENSTOCK, BRIGGS LEASING CORPORATION and BRIGGS ACQUISITION CORPORATION,

*Defendants.*

## Questions Presented

1 a. Where the explicit text of Rule 60(b) itself only allows a "party" to seek relief from a final judgment, does a nonparty have standing to make a Rule 60(b) motion?

b. Does a nonparty have Article III §2 standing to make a Rule 60(b) motion?

c. Does the Second Circuit have the power to create an exception to Rule 60(b) to allow nonparties to seek relief from a judgment and thereby give itself jurisdiction?

2. Was it an error of law for the Court of Appeals to vacate the judgment as "void" under Rule 60(b)(4) on the ground that Briggs, a corporation, was denied due process of law because at the time a default judgment was entered against it in 1993, it had not been represented by counsel for five years and after an additional four years, Briggs was still not represented by an attorney, and through its President and 93% shareholder, Briggs in 1997 stipulated to the amount of damages to be inserted in a 1993 default judgment?

3. After knowing all the facts, was respondents' five year delay before bringing a Rule 60(b) motion beyond a "reasonable time" as a matter of law?

4. Was it an abuse of discretion to vacate the judgment where the lower courts failed to comprehend the economic and legal consequences of fraudulent conveyances?

5. Does reversal of the order vacating the 1997 judgment require reversal of the orders dismissing the two actions to collect the judgment?

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners respectfully petition for a Writ of Certiorari to review the April 4, 2006 judgment of the Second Circuit Court of Appeals in this case.

## OPINIONS BELOW

The latest Second Circuit opinion entered on April 4, 2006 affirmed the grant of nonparty respondents Rule 60(b)(4) motions to vacate petitioners' August 15, 1997 judgment against Briggs Leasing Corporation ("Briggs") for $4,028,000 in *Grace v. Rosenstock, 85 cv. 2039, (Grace #1)* on the ground it was void (1a). That opinion also affirmed the dismissal of petitioners' action against Bank Leumi Trust Company of New York, et al. (50a) and petitioners' separate action against Harvey Schwartz, et al. (51a) for the collection of petitioners' $4,028,000 judgment A petition for rehearing and en banc were denied on May 30, 2006 (27a). The Memorandum and Order entered in the district court for the Eastern District of New York on October 4, 2004 in *Grace #1*, David G. Trager, judge (28a), granted nonparty respondents' motion to vacate petitioners' judgment under (b)(4) and (b)6.

The initial Second Circuit opinion in this class action, entered on August 25, 2000 affirmed, *inter alia,* the dismissal of the amended complaint against defendant, Robert Genser, after a bench trial, as a matter of law, without any findings of fact, for alleged violations of §10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5, (80a) is reported as *Grace v.*

*Rosenstock,* 228 F. 3d 40 (2d Cir. 2000); *Grace #1.* That opinion also affirmed the denial of petitioners' motion to add respondents as parties in order to assert claims against them as transferees of fraudulent conveyances from Briggs for unfair consideration, namely, Briggs transferred total mortgages (first to fifth) to respondents in the amount of $10.6 million and respondents only transferred consideration of less than $2.5 million to Briggs and paid $8.1 million of consideration to Robert Rosenstock, the 93% majority stockholder of Briggs. Finally, when Briggs sold its real estate for $4.65 million, Briggs transferred $4.1 million to respondents, for which Briggs received no consideration from respondents.

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) for the purpose of declaring that the lower courts did not have jurisdiction over respondents' Rule 60(b) motions on the grounds that respondents are nonparties and have no standing since Rule 60(b)'s text only allows a party or his representative to seek relief from a judgment. Also respondents lack Article III, §2 standing. Hence, there was no jurisdiction in the lower courts and the order and judgment entered vacating petitioners' judgment are *ultra vires* and void.

The latest judgment of the Second Circuit Court of Appeals was entered on April 4, 2006. The Court of Appeals entered an order denying a timely petition for rehearing and for rehearing en banc on May 30, 2006. On August 16, 2006 Judge Ginsburg granted petitioners an extension of time to and including October 27, 2006 to file a petition for a writ of certiorari in this case (Application No. 06A189).

## CONSTITUTION, STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Section 2 of Article III of the Constitution is set forth in the Appendix, 52a.

Federal Rule 55 of Civil Procedure entitled "Default", in pertinent part, is set forth in the Appendix, 52a.

Federal Rule 60(b) of Civil Procedure, in pertinent part is set forth in the Appendix, 53a.

New York Debtor and Creditor Law, § 273-a entitled "Conveyances by defendants"is set forth in the Appendix, 54a.

## STATEMENT

After not appearing by an attorney for five years, in 1993, a default judgment on liability was entered against defendant Briggs (79a). Four years later, an inquest on damages was scheduled for trial before visiting Judge Charles R. Wolle in August, 1997. Trial was also scheduled to proceed against Robert Rosenstock at the same time. It was now nine years since Briggs was represented by attorneys. With court approval, Rosenstock's attorney had withdrawn. Judge Wolle strongly advised the parties that if a settlement was not reached by August 4, 1997, the matter would be tried on August 11, 1997. Rosenstock, as 93% stockholder and President of Briggs, negotiated for Briggs and arrived at the amount of $4,028,000 as damages against Briggs to be inserted in the default judgment. Rosenstock agreed to liability and damages of $6.9 million to be entered in a

judgment against him personally. The plaintiffs class, Rosenstock and Briggs entered into a stipulation of settlement which was approved by order of Judge Trager on August 4, 1997 who also ordered the Clerk to enter a judgment. On August 15, 1997, the Clerk, *inter alia* , entered a judgment against Briggs for $4,028,000 (127a). A writ of execution against Briggs by plaintiffs as judgment creditors was returned unsatisfied on March 10, 1998. A writ of execution against Rosenstock was also returned unsatisfied.

In the first appeal in *Grace #1,* petitioners brought up for review the denial of plaintiffs' motion to supplement their complaint to add parties and claims, *inter alia*, to recapture Briggs' fraudulent conveyances of $10.6 million of mortgages and notes, and $4.1 million of cash (total amount of $14.7 million) to Bank Leumi, Berger, Mack and Apex Marine for the unfair consideration to Briggs of less than $2.5 million. The Second Circuit affirmed (*Grace, et al., v. Rosenstock, et.al.*, 228 F.3d 400 (2d Cir. 2000) *cert. den.*, 532 U.S. 923 (2001)). In return for Briggs' fraudulent conveyances, $8.1 million consideration from Bank Leumi et.al., went directly into Robert Rosenstock's personal bank account or was used for Rosenstock and Genser's personal ventures. As a result of the fraudulent conveyances, Briggs was reduced to an empty shell. Inasmuch as those fraudulent conveyances occurred during the Grace #1 litigation, it triggered plaintiffs' claims under New York's Debtor Creditor Law, Section 273-a, which did not accrue for purposes of statute of limitations until execution on the judgment is returned unsatisfied.

No appeal was taken from the August 15, 1997 judgment; it was never modified or altered. Bank Leumi, Berger, Mack and Apex Marine appeared in the district court and the Court of Appeals and successfully argued

against being added as parties. Costs in Grace #1 were taxed and the case was closed.

On August 19, 2002, plaintiffs class, as judgment creditors instituted an action in the Southern District 02 CV 6612 before Judge Richard Berman (hereinafter Grace #2) to collect their August 15, 1997 judgment for $4,028,000 against Briggs from defendants Bank Leumi, Berger, Mack and Apex Marine (hereinafter "Bank Leumi, et.al.") by recapturing the $4.1 million paid to respondents without any consideration whatsoever and to void the fraudulent mortgage transactions. 55a. A like action was instituted against Harvey Schwartz as the transferee from the Estate of Leo Berger (*Grace #3).* That August 15, 1997 federal judgment is the basis for subject matter jurisdiction in the Southern District in *Grace* #2 and *Grace #3* (*Epperson v. Entertainment Express, Inc.* 242 F.3d 100, 106-107 (2d Cir. 2001)).

In November 2002, Judge Trager gave non-party defendants Bank Leumi, Berger, Mack and Apex Marine permission to make a motion in Grace #1 to set aside the August 15, 1997 judgment against Briggs as allegedly void under Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure. The matter was fully briefed by July 2003. After a telephone conversation between Judge Trager and Judge Berman on February 13, 2004, Judge Berman transferred *Grace* #2 and *Grace* #3 to Judge Trager, *sua sponte,* without any notice to any attorneys pursuant to 28 U.S.C. §1404(a).

The Second Circuit created "an exceedingly narrow exception" (15a) to Rule 60(b)'s limitation that a "court may relieve a party or a party's legal representative from a final judgment..." on "such terms as are just" in order to give "standing" to these nonparty respondents Bank Leumi,

David Mack, Leo Berger and Apex Marine Corp. (collectively referred to as "Leumi") (transferees of fraudulent conveyances) to make a Rule 60(b) motion.

The Second Circuit affirmed the grant of non-party movants motion under Rule 60(b)(4) to set aside a judgment, brought nine years after the entry of a default judgment against Briggs Leasing Corp. ("Briggs") and five years after the insertion of the amount of damages in that default judgment by stipulation. The judgment was vacated on the ground that Briggs, a corporation, was not represented by an attorney for nine years and therefore was denied due process of law.

## REASONS FOR GRANTING THE PETITION

### I. The Nonparty Respondents Lack Standing Under Rule 60(b) And Under Article III §2; Hence, There Is No Jurisdiction

This petition for a writ of certiorari should be granted because respondents, not parties in the *Grace #1* litigation, lack standing under Rule 60(b) which only allows a party to seek relief from a final judgment, and lack standing under Article III §2 since there is no justiciable "case" or "controversy". Thus, there is no jurisdiction. Without jurisdiction, the district court's 2004 order vacating the 1997 judgment and the Second Circuit's judgment affirming that order are *"ultra vires"*. *Steel Co. v. Citizens for Better Environment,* 523 U. S. 83, 101-102 (1998). If petitioners prevail on either standing issue, then there is no jurisdiction, and the grant of respondents' Rule 60(b) motion must be reversed.

*Kowalski v. Tesmer,* 543 U.S. 125, 128-129 (2004) stated: "The doctrine of standing asks whether a litigant is

entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise". Our case concerns standing on two issues: (i)"constitutional limitations on federal court jurisdiction" under Article III and (ii) the limitation on a party's relief from a judgment under Rule 60(b). Below, we demonstrate there was no Rule 60(b) standing and independently, no Article III standing.

*Steel Co.* emphasized that jurisdictional arguments "would have to be considered by this Court even though not raised earlier in the litigation – indeed, this Court would have to raise them *sua sponte.*" 523 at 93[1].

In R*uhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999), this Court unanimously stated: "*Steel Co.* reiterated 'the requirement that jurisdiction be established as a threshold matter . . is 'inflexible and without exception' . . . for '[j]urisdiction is power to declare the law', and '[w]ithout jurisdiction, the court cannot proceed at all in any cause. . . The Court, in *Steel Co.*, acknowledged that 'the absolute purity' of the **jurisdication – first** rule[2] had been diluted in a few extraordinary cases . . ." (citations omitted).

**A. Nonparty Respondents Lack Standing Under Rule 60(b)**

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[1] In its answering brief in the Court of Appeals, Bank Leumi conceded that "Leumi was not affected by, and had no reason (let alone standing) to seek affirmative relief from, that [1997] judgment" until the commencement of *Grace* #2 )Leumi Br. 45).

[2] Emphasis supplied throughout unless otherwise noted.

This case presents the jurisdictional issue of whether nonparty respondents have "standing" to make their Rule 60(b) motion. "Rule 60(b) allows a **party** to seek relief from a final judgment, and request reopening of **his** case, under a limited set of circumstances . . ." *Gonzalez v. Crosby* 125 S. Ct. 2641, 2645, 545 U.S. 524 (2005). Rule 60(b)'s text limits standing to a "party or a party's legal representative." Respondents are neither.

Here, the Second Circuit erred by creating "an exceedingly narrow exception to the well established rule that litigants, who were neither a party, nor a party's legal representative to a judgment, lack standing to question a judgment under Rule 60(b)" (15a). By creating "an exceedingly narrow exception," the Second Circuit effectively amended Rule 60(b) to allow "nonparties" to make Rule 60(b) motions. In *Whitmore v. Arkansas,* 495 U.S. 149, 155-156 (1990) this Court with respect to Art. III standing requirements held a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." Petitioner in *Arkansas* argued that the "court should create an **exception** to traditional standing doctrine for this case . . ." id. at 161. This Court rejected that suggestion and stated that "restraint is even more important when the matter at issue is the constitutional source of federal judicial power itself." Id. The Second Circuit's "exception" here to the standing requirements of Rule 60(b) also should be rejected.

In *Amchem Products, Inc., v. Windsor,* 521 U.S. 591, 620 (1997), this Court in a solid holding declared the "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress . . . The text of a rule thus proposed and reviewed limits judicial inventiveness.

Courts are **not free to amend** a rule outside the process Congress ordered . . ." Thus, the Court of Appeals violated the teaching of *Amchem Products, Inc., supra,* and "amended" Rule 60(b)'s text in order to give hostile nonparties "standing" to attack a judgment to which they were not parties[3]. By so doing, the Second Circuit empowered itself to take jurisdiction which was an *ultra vires* act considering that court's limited federal jurisdiction. It is also violative of Rule 82 ("rules shall not be construed to extend . . . the [subject matter] jurisdiction of the United States district courts"). Id. at 613.

In *United States v. Beggerly*, 524 U.S. 38, 46 (1998), respondents were sued by the United States in the original suit which was settled. Twelve years later, respondents brought an independent action under Rule 60(b) to set aside the settlement under the equivalent of Rule 60(b)(3) "fraud . . . misrepresentation, or other misconduct of an adverse party." *Beggerly* held that even if an independent action is brought under Rule 60(b), it relies "on the underlying suit as the basis for jurisdiction . . ." *Beggerly* is easily distinguished because the action was instituted by respondents who were party defendants in the original suit. Here, the Second Circuit in the first appeal in *Grace* #1 affirmed the district court's refusal to take jurisdiction over respondents and the claims against them. *Grace,* 228 F. 3d at 55-56. Thus, *Grace* #1 was *res judicata* on the issue of no jurisdiction over respondents. After successfully opposing being made parties in *Grace*

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[3] Indeed, since petitioners seek to collect the Briggs judgment from respondents, then respondents are clearly hostile to Briggs and petitioners. Thus, as a matter of law, respondents do not stand in the shoes of a party to challenge that judgment. See *In re El Paso Refinery,* LP, 37 F. 3d 230, 234 (5th Cir. 1994).

*#1*, respondents should not be relieved from their deliberate choice not to be made parties. *Ackerman v. United States*, 340 U.S. 193, 198 (1950).

On nonparty respondents' motion under Rule 60(b), the district court and the Second Circuit erred in relying upon the underlying suit in *Grace* #1 under 28 U.S.C. §1331 as the basis for its jurisdiction. (11a). The *Beggerly* rule is not applicable here where nonparty respondents were not parties in *Grace #1*. Nonparty respondents failed to establish an independent basis for jurisdiction to entertain their Rule 60(b) motion in *Grace* #1.

*Beggerly* also held Rule 60(b) must be "interpreted as a coherent whole" and be reserved for cases "only to prevent a grave miscarriage of justice." Id. 46-47. *Beggerly* further held: "it surely would work no 'grave miscarriage of justice,' and perhaps no miscarriage of justice at all, to allow the judgment to stand." Id. Here too, there would be "no miscarriage of justice at all, to allow the judgment to stand" inasmuch as the nonparty respondents were transferees from Briggs of fraudulent conveyances for unfair consideration in violation of §273-a of New York's Debtor-Creditor Law and their participation allowed Rosenstock to loot $8.1 million from Briggs. Also, the respondents received $4.1 million in 1990 from Briggs, without any consideration going to Briggs. That money should have paid the Briggs judgment held by petitioners.

Rule 60(b) provides a central exception to the rule on finality of judgments. Thus, the Second Circuit's capricious enlargement of Rule 60(b) is in square conflict with a "very strict interpretation of Rule 60(b) [that] is essential if the finality of judgments is to be preserved" (*Liljeberg v. Health Svcs. Acq. Corp.*, 486 U.S. 847, 864 (1988), id. at 873, *Rehnquist, C.J.* dissenting).

*Bender v. Williamsport Area School District*, 475 U.S. 534, 543 (1986) held: "Since the judgment against respondent was not in his individual capacity, he had no standing to appeal in that capacity." Our case is *a fortiori* where the respondents are not parties to the litigation and thus, lack standing as a matter of law.

Respondents have no standing under Rule 60(b). Hence, no jurisdiction. Without jurisdiction, the district court's order setting aside the August 15, 1997 judgment is void. Likewise, the Second Circuit's judgment affirming that order is also void. Accordingly, review by this Court is vital, especially where no other Court of Appeals in the entire country has adopted the Second Circuit's arbitrary "exception" to, and amendment of, Rule 60(b).

### B. The Nonparty Respondents Lack Article III Standing

The respondents here successfully opposed being added as parties to *Grace #1*, 228 F. 3d at 55-56. As nonparties to the judgment and to the litigation in *Grace #1*, respondents lack standing under Article III, §2 of the Constitution.

*Steel Co.*, 523 U.S. at 102 held: "the threshold jurisdictional question [is] whether respondent, the plaintiff below, has standing to sue. Article III, §2 of the Constitution extends the Judicial Power of the United States only to 'Cases' and 'Controversies'. We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process. *Muskrat v. U.S. supra*, at 356, 357 . . . Standing to sue is part of the common understanding of what it takes

to make a justiciable case. *Arkansas* 495 U.S. 149, 155 (1990)."

Therefore, the issue here is whether respondents satisfied the "standing" requirements and established the existence of a "justiciable case" under Article III. *Arkansas,* 495 U.S. at 155. In response to petitioner's argument in *Arkansas* that this Court "should create an exception to traditional standing doctrine in [that] case", this Court held: "the requirement of an Art. III "case . . ." is not merely a traditional 'rule of practice', but rather is imposed directly by the constitution." Id. at 161. Thus, this Court acknowledged that it was unable to "expand our jurisdiction" because "restraint is even more important when the matter at issue is the constitutional source of the federal judicial power itself." Id. Accordingly, the "exception" created by the Second Circuit to give itself "standing" violated the constitutional limitation set forth in *Arkansas* under Art. III.

In *Muskrat v. United States,* 219 U.S. 346, 356 (1911), this Court stated that a "case" "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." Clearly, nonparty respondents are outside that requirement.

Speaking of Article III, conferring judicial power, this Court held: "That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . ." Id. at 358. But here, the respondents are not a party to *Grace #1* and therefore are incapable of submitting an issue to the judicial power.

In *Steel Co.,* 523 U.S. at 102-110, after reviewing the three requirements of injury in fact, causation, and

redressability, this Court found lack of **standing** and lack of **jurisdiction.**

Inasmuch as respondents were not parties in *Grace #1*, then there was no justiciable "case" or "controversy" as a matter of law under Article III. Thus, like in *Steel Co.*, respondents lack standing and this Court and the lower courts "lack jurisdiction to entertain" respondents' Rule 60(b) motion.

### C. Reversal Of The *Grace #1* Order Vacating The Judgment Requires Reversal Of The Orders Dismissing The Two Actions To Collect The Judgment

Lack of respondents' standing, hence no jurisdiction requires reversal of the order vacating petitioners' $4,028,000 judgment against Briggs. Accordingly, there would be a $4,028,000 judgment on which to collect and that requires a reversal of the orders dismissing the actions against Bank Leumi, et al. in *Grace #2* and against Harvey Schwartz, et al. in *Grace #3*. 50a-51a.

### D. Effectively, Amending Rule 60(b) Deprived Petitioners Of Their Constitutional Protection Of (i) Full Faith And Credit To Their Federal Judgment And (ii) Due Process Of Law For Their Fraudulent Conveyance Claims

This Court in *Plant v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234 (1995) stated that: "Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is *always* a denial of property without due process of law . . ." But where the 2004 order setting aside the default judgment was issued eleven years after the entry of the 1993 default judgment

and where the Second Circuit on an *ad hoc* basis created an "exceedingly narrow exception" to Rule 60(b) to allow non parties to have standing to be relieved from a default judgment against Briggs, both of which were *ultra vires*, then the lower courts' orders vacating petitioners' August 15, 1997 judgment against Briggs constitute a taking of property without due process of law.

By legislating a major change to the explicit text of Rule 60(b), the Second Circuit in their 2006 opinion has effectively deprived petitioners (i) of their constitutional protection of full faith and credit that is required to be given to their federal judgment against Briggs in the approximate amount of $4 million - - that judgment was plainly not void for lack of due process of law under deeply rooted decisions in this Court, *infra*, Point II and (ii) of their day in court on the merits of their fraudulent conveyance claims against respondents in Grace #2 and #3 and thus denied petitioners of their property without due process of law even though in the first appeal that court held "the denial of leave to bring in new defendants does not have preclusive effect with respect to the claims against those [respondents]." *Grace*, 228 F. 3d. at 56. (124a).

## II. Where Briggs Did Not Appear By An Attorney For Over Five Years, The Entry Of A Default Judgment Against It Did Not Deny Briggs Of Due Process Of Law And Therefore The Judgment Was Not Void.

On October 4, 2004, Judge Trager granted the non parties' motion "vacating the default judgment" as "void". *Appendix, Grace XI.* 26a.

After Briggs did not appear by an attorney for over five years, a default judgment was entered against it in

November, 1993 by Judge Johnson. 79a. That order was conclusively valid based on the authority of Rule 55(a) and (b)(2), *Dow Chemical Pacific Ltd., v. Rascator Maritime S.A.*, 782 F. 2d 329, 336-7 (2d Cir. 1986).

In *Ins. Co. of Ireland*, 456 U.S. at 705, this Court cited *Hammond Packing Company v. State of Arkansas*, 212 U.S. 322, 350-351 (1909) for the proposition that the entry of a default judgment did not violate due process of law and rejected the contention that the entry of a default judgment was "repugnant to the Constitution of the United States" (id., 212 U.S. at 354).

The Second Circuit erred in holding that in "ordering the judgment following the stipulation, the district court acted in a manner inconsistent with due process of law." (Slip Op. 21-22). Indeed, as demonstrated below, petitioners followed the deep rooted procedure of making a settlement with Rosenstock, personally and as President, director and 93% stockholder of Briggs, on behalf of Briggs. That settlement, instead of a judicial inquest at which Briggs would not appear by counsel, was approved by two federal judges, Judge Wolle and Judge Trager. Indeed, Judge Wolle strongly "urged" the parties to settle. They did. After the stipulation of settlement was executed, Judge Trager on August 4, 1997 executed an order explicitly approving the stipulation of settlement and ordering the entry of a judgment.

The order entered by Judge Trager explicitly stated: "2. Since a Default Judgment on the issue of Liability was entered against defendant Briggs Leasing Corporation, judgment shall be entered in favor of the plaintiffs class against the defendant Briggs Leasing Corporation in the amount of $4,028,000." 130a.. Accordingly, Judge Trager was fully knowledgeable about the default judgment

entered against Briggs in November 1993 for not appearing by counsel and certainly knew that Briggs was still not represented by an attorney. Also, the stipulation of settlement upon which Judge Trager entered his August 4, 1997 order approving the settlement, likewise had a similar provision about the default judgment entered against Briggs. 132a.

Therefore, it is fundamentally unfair for the Second Circuit to now say that the proper course for petitioners was to ask the Court to "conduct such hearings or order such references as it deem[ed] necessary and proper" especially after the district court itself strongly urged and approved the settlement process and final settlement. 21a.

**A. Where Briggs (a corporation) Did Not Appear By an Attorney For Over Nine Years, It Was Not a Denial of Due Process of Law To Allow Its President and 93% Shareholder to Stipulate As To The Amount Of Damages To Be Inserted In The 1993 Default Judgment**

The text of Rule 60(b)(4) is explicitly limited only to where "the judgment is void." Thus the stipulation of settlement **is not covered by Rule 60(b)(4)**. The lower courts held that the insertion of the stipulated damages into the default judgment made the entire judgment "void" because Briggs was not represented by an attorney. That is a non-sequitor. The language of Rule 60(b)(4) must be strictly construed. Stipulations of settlement are not covered in (b)(4).

To suddenly change the law on the issue of default judgments against corporations who do not appear by counsel and to hold that the only way damages can be fixed is by an inquest before a Court is an amendment of the text

of Rule 55(b)(2) by the Second Circuit. That amendment is barred by *Amchem Products, Inc.*, 521 U.S. at 620. Indeed it appears to be the only one in the country.

Rule 55(b)(2), entitled "Judgment By the Court" relating to default judgments provides that "to determine the amount of damages . . . the court may conduct such hearings or order such references as it deems necessary and proper . . . . " In addition to ascertaining damages by proof, there was another alternative, by stipulation.

In *Pope v. United States*, 323 U.S. 1, 11-12 (1944), this Court held it is still part of the judicial function for the "facts to be ascertained by proof or **by stipulation. It is a judicial function and an exercise of the judicial power to render judgment on consent.**" Even though *Pope* was cited by petitioners for its holding, the Second Circuit overlooked it and failed to discuss it. By failure to discuss the Court's "judicial power to render judgment on consent," the Second Circuit *sub silentio* effectively reversed *Pope*. Thus, the district court's August 4, 1997 Order approving the July 31, 1997 stipulation on damages to be entered into the default judgment was a judicial act and an exercise of the district court's discretion under Rule 55(b)(2).

The Second Circuit, contrary to established law, holds that the **only** way to arrive at damages where a corporate defendant is without counsel and has a default judgment entered against it, is for the Court to hold an inquest. The Panel stops there. But at such an inquest, Briggs would not have been represented except by Rosenstock. So that scenario does not change the substance. The Second Circuit created that argument *sua sponte*, without giving petitioners an opportunity to address

it. That ruling is an error of law under *Cooter & Gell* and constitutes an abuse of discretion.

*Schifrin v. Chenille Mfq. Co.* 117 F.2d 92, 93 (2d Cir. 1941) held that the "president of the defendant corporation had power to act for the corporation." Likewise, here, Rosenstock, as president and 93% stockholder of Briggs, had the power to act for it. The burden to show absence of authority in Rosenstock was on respondents. The Second Circuit's holding that Rosenstock had no authority in 1997 to agree to entry of the $4,028,000 judgment against Briggs is a conclusory finding without any evidentiary support in the record. 21a. There was not a scintilla of evidence to support it. None is cited by the lower courts.

Contrary to the appeals court , there was no true conflict between Rosenstock and Briggs because Rosenstock agreed to **lesser damages** of $4 million against Briggs to be inserted in the default judgment based on the existing complaint, whereas Rosenstock representing himself personally agreed to the entry of a judgment on **liability and damages** in the far greater amount of $6.9 million based on the supplemental and amended complaint that petitioners were not permitted to file. Thus, Rosenstock did a far better negotiation for Briggs than for himself.

Contra the Second Circuit (21a) and the district court, Rosenstock **never confessed judgment on liability on behalf of Briggs.** Briggs' liability was established by the default judgment. Thus, confessing judgment cases cited by the lower courts are clearly not applicable here. That is another error of law.

**B. Rule 55(b)(2) Does Not Require A**

**Hearing On The Amount Of Damages After The Entry Of A Default Judgment**

*Fustok v. Conticommodity Services, Inc.* 873 F2d. 38, 40 (2d Cir. 1989) held: "By its terms, 55(b)(2) leaves the decision of whether a hearing [on damages] is necessary to the discretion of the district court." A party contended his right to due process had been violated because he did not participate in a hearing on the amount of damages as required by Rule 55(b)(2). It was held that the court "acted reasonably within his discretion in **declining** to hold a hearing before fixing damages . . ." Id. The Second Circuit in *Fustok* further held: "While it is true . . . that the damages in this case were neither liquidated nor capable of mathematical calculation, it was not necessary for the District Court to hold a hearing, as long as it ensured that there was a **basis for the damages** specified in a default judgment." Id. Here, there was a reasonable basis for the damages of $4,028,000 set forth in the stipulation, the order approving the stipulation and in the judgment.

The $4,028,000 was based on the following four items: (i) the 14% class ownership of a $6 million value on Briggs' real estate or $841,000, (ii) 14% of the corporate opportunity valued at $4,536,000 or $635,000, (iii) interest at 12% compounded annually on the first two items, amounts to $1,985,000 and (iv) attorneys fees in the amount of $567,000.

**a. The $6 Million Value On Briggs Real Estate.**

In 1988 and 1989, Briggs issued notes and first, second, third, fourth and fifth mortgages on its only real estate to respondents for $10.6 million. In July 1989 Briggs entered into a contract to sell that same real estate for $6 million. The real estate bubble burst and the sale of Briggs' real estate closed in January 1990 to the same buyer at $4.65 million. Applying the 14% class

shareholding to the $6 million real estate value yielded the shareholders $841,000 out of the $4,028,000 settlement amount - - a perfectly reasonable sum.

**b. The $4,536,000 Value On Briggs Corporate Opportunity Appropriated By Rosenstock.** The appropriation of Briggs' corporate opportunity to purchase the two automobile franchises generated an average cash flow of $1 million for each of two years. Using a well established method of valuing a company's cash flow times a multiple of 8 resulted in a value of $8 million. For settlement purposes, the reduced amount of $4,536,000 was used as the value of the corporate opportunity. Applying the 14% class shareholding to that value yielded the stockholders $635,000 on that component of damages.

**c. Applying An Interest Rate Of 12% Compounded Annually To The Damage Settlement Value On Both The Real Estate And Corporate Opportunity Yielded A Reasonable Amount For Interest.** Combining the entitlement of $841,000 in damages for the real estate and $635,000 for misappropriation of corporate opportunities yields total damages of $1,476,000. Applying 12% interest compounded annually is $1,985,000 for the stockholder class or a total for damages and interest of $3,461,000[4].

**d. Reducing The Amount Of Attorneys Fees From $1 Million To $567,000 For Purposes Of Settlement Damages Was Reasonable.** The attorneys fees of $567,000 included in the settlement damages brings the total settlement damages to $4,028,000.

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[4] In 1984 Briggs refinanced its long term debt at 14% (Proxy Statement, F-10). Thus, the use of a 12% interest rate is reasonable. Considering the fraud practiced on the stockholders here, compounding of interest is appropriate (see *Sauers v. Alaska Barge,* 600 F2d 238 (9th Cir. 1979) and *Slater v. Texaco, Inc.* 506 F. Supp. 1099 (D. Del. 1981).

## III. Respondents' Five Year Delay In Bringing Their Rule 60(b) Motion Was Untimely As That Was Not "Within A Reasonable Time"

Respondents have failed to abide by the requirement in the text of Rule 60(b) that motions must "be made within a reasonable time". Having collaterally attacked the 1997 judgment on the first appeal in *Grace* #1, respondents deliberately chose to wait for over five years from the 1997 entry of the judgment to bring a Rule 60(b) motion. As a matter of law, that was untimely.

Once respondents understood that petitioners would necessarily pursue collection of the judgment against Briggs, by seeking to recapture the transfers without fair consideration from the transferees, then respondents should not be released from their tactical decision not to file an immediate Rule 60(b) motion or a cross appeal in *Grace* #1.

## IV. Failure To Comprehend The Economic And Legal Consequences Of The Fraudulent Conveyances Here Was An Abuse Of Discretion As A Matter Of Law Under *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)

This Court in *Cooter & Gell,* id., held: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." The lower courts abused their discretion here by their failure, factually and legally, to comprehend the economics of the fraudulent conveyances.

On October 4, 2004, Judge Trager granted respondents' Rule 60(b)(4) and (6) motion to vacate petitioners' judgment against Briggs (28a). It held that judgment was "void" under Rule 60(b)(4) and also cited (b)(6) grounds (46a). The district court failed to comprehend the legal and economic significance of these fraudulent transactions. That failure is objectively demonstrated by the district court's statements about Briggs' $4.1 million cash payment to Leumi. By definition that $4.1 million cash payment is a fraudulent conveyance under DCL §270 and §273-a as there was no consideration given to Briggs. As a matter of law, the $10.6 million in fraudulent mortgages to Leumi were void, did not constitute valid antecedent debts and could not be treated as consideration for Briggs' $4.1 million cash payment to Leumi. The district court treated Briggs' void $10.6 million debt as though it was a valid antecedent debt and consideration for the $4.1 million payment by Briggs to Leumi. The district court did this by calling the $4.1 million payment the "same conveyance" (34a, note 6) as the $10.6 million of void mortgages. The Second Circuit failed to render any legal analysis of the district court's critical error of law. Accordingly it erroneously approved the district court's error of law which was an abuse of discretion under the Supreme Court's decision in *Cooter & Gell vs. Hartmarx Corp.*, 496 U.S. at 405.

The district court demonstrated its lack of economic comprehension by stating that "movants lost large sums because of Briggs inability to repay **its debts**" (34a).[5] But

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[5] The district court also erroneously stated "Mack, Berger, and Apex Marine Corp. collectively lent $3.5 million, recovered $1 million, and consequently lost $2.5 million" (34a, note 7). But Mack et al. did not truly lend $3.5 million to Briggs, the only consideration they paid to

Briggs fraudulent conveyances were not true "debts" for fair consideration. The district court erroneously believed Briggs was obligated to pay a fraudulent and void "debt" of $10.6 million to Leumi, et al. Therefore, the district court's lack of comprehension of the legal and economic issues incapacitated it to legally exercise any discretion on this Rule 60(b) motion.[6]

By making the statement that the movants receipt of $4.1 million out of the proceeds of Briggs real estate sale, "were allegedly millions of dollars less than the amounts they had loaned" (id.), the Court of Appeals was also accepting and approving the district court's clearly erroneous finding that Mack, Berger and Apex lost $2.5 million and Leumi "similarly lost millions of dollars" (34a,

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Briggs was, at most, $417,000; the balance of $3 million went into Robert Rosenstock's personal bank account and his personal business ventures. The district court erred in stating Mack et al. recovered $1 million; that was a separate fraudulent conveyance.

[6] Apparently the Second Circuit suffered from the same mistaken legal and economic rationale as the district court. The Court of Appeals' lack of economic understanding is objectively demonstrated by the following statement "[a]lthough movants did receive proceeds of real estate sales made by Briggs, these payments were allegedly millions of dollars less than the **amounts they loaned.**" (9a, note 5). Thus, the Second Circuit treated the **total** consideration of $10.6 million paid by Leumi as though it all went to Briggs when only $2.5 million went to Briggs. The Court of Appeals , without any factual and legal analysis, simply failed to recognize Briggs' $10.6 million mortgage transfers to Leumi as fraudulent conveyances under §273-a. That was an error of law and an abuse of discretion by the Panel under *Cooter*.

note 7). The district court's only cite to support that finding was Mack's counsel's unsupported statement at oral argument (id). Certainly, that does not rise to the level of "highly convincing" evidence which is necessary, especially since the movants failed to provide any evidence of the amount they recovered from the sale of other properties (not owned by Briggs') that was held as security. Indeed, the district court arbitrarily assumed "zero" as the proceeds on movants' foreclosure of the other real estate held as security. The undisputed evidence showed that the combined appraisal value of those other properties was $5.3 million – $4,125,000 on Rosenstock's personal property at 124 South Middle Neck Road and $1,175,000 on Rosenstock and Genser's personal property at 732 Northern Boulevard – (160a).

Furthermore, after Leumi itself received a cash payment of $3.1 million, it assigned Briggs' remaining mortgage and note to European American Bank by a separate agreement but failed to indicate the amount of consideration Leumi received. (162a, ¶55). By concealing the true facts the movants successively deceived the courts below as to the amounts realized by the movants from the other security. Accordingly, the district court's statement – with the Second Circuit's approval – that Leumi and Mack, et al. lost millions of dollars on these transactions constitutes a clearly erroneous assessment of the evidence and error of law under *Cooter*.

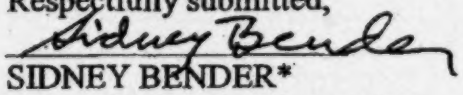
In any event, the issue of whether the movants made or lost money on their fraudulent mortgage transactions is irrelevant to the Rule 60(b) motion issue of whether the movants have "standing," made a "timely" motion or whether the judgement was "void."

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: New York New York
October 27, 2006

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: September 12, 2005 - Decided: April 4, 2006)

Docket Nos. 04-5824-cv(L), 04-5840(con) & 04-5842-cv-(con)

LORRAINE G. GRACE, Individually and as Executrix of the Estate of OLIVER R. GRACE, GERALD I. WHITE, Trustee U/W MORGAN H. GRACE, for the Marital Deduction Trust, GERALD I. WHITE, Trustee U/W MORGAN H. GRACE for the Non-Marital Deduction Trust and GERALD I. WHITE, Trustee U/W MORGAN H. GRACE for the Generation Skipping Trust and GERALD I. WHITE, Trustee of the JOHN E. GRACE TRUST, individually and as stockholders of BRIGGS LEASING CORP., suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

*Plaintiffs-Appellants,*

-v.-

BANK LEUMI TRUST COMPANY OF NEW YORK, DAVID MACK, the Estate of LEO V. BERGER, APEX MARINE CORP., HARVEY SCHWARTZ, PHYLLIS SEPE and SIGMUND KASSAP, Trustee of the LEO V. BERGER GRANTOR TRUST NO. 1 as Personal Representative of the ESTATE OF LEO V. BERGER,

*Non-Party Movants-Defendants-Appellees,*

ROBERT ROSENSTOCK, ROBERT GENSER, EDWARD ROSENSTOCK, BRIGGS LEASING CORPORATION and BRIGGS ACQUISITION CORPORATION,

Defendants.

CARDAMONE, CABRANES, and POOLER, Circuit Judges

Plaintiffs-appellants appeal from an order, entered in the United States District Court for the Eastern District of New York (Trager, J.), granting non-party movants-defendants-appellees' motion to vacate a judgment. See Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Oct. 5, 2004). Plaintiffs-appellants also appeal from two orders, entered *sua sponte* in the United States District Court for the Eastern District of New York (Trager, J.). Grace v. Bank Leumi Trust Co. of New York, No. 04-cv-0708 (E.D.N.Y. Oct. 14, 2004); Grace v. Schwartz, No. 04-cv-1622 (E.D.N.Y. Oct. 14, 2004).

Affirmed.

SIDNEY BENDER and Risa Bender, Leventritt Lewittes & Bender, New York, NY, for Plaintiffs-Appellants.

ROBERT FRYD and Donald Levinsohn, Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York, NY, for Non-Party Movant-Defendant-Appellee Bank Leumi Trust Company of New York.

DAVID T. AZRIN and Harvey Schwartz, Gallet Dreyer & Berkey, LLP, New York, NY, for Non-Party Movants-DefendantsAppellees David Mack, the Estate of Leo V. Berger, Apex Marine Corp., Harvey Schwartz, Phyllis Sepe and Sigmund Kassap, Trustee of the Leo V. Berger Grantor Trust No. 1 as Personal Representative of the Estate of Leo V. Berger.

POOLER, Circuit Judge:

Three appeals have been consolidated in this case. On July 3, 1985, plaintiffs-appellants ("plaintiffs") commenced a federal action, against Briggs Leasing Corporation ("Briggs"), Briggs Acquisition Corporation ("BAC"), and individual defendants, in which plaintiffs asserted individual, class, and derivative claims for "equitable and other relief." On March 17, 1994, the United States District Court for the Eastern District of New York (Johnson, a entered a default judgment against Briggs. A trial against defendant Robert Rosenstock and an inquest to fix damages against Briggs were scheduled to begin in August 1997. On July 31, 1997, plaintiffs and Robert Rosenstock entered into a stipulation of settlement against Briggs and Robert Rosenstock. On August 5, 1997, the United States District Court for the Eastern District of New York (Trager, J.) approved the stipulation by order and directed the clerk to enter a final judgment, which the clerk did against Briggs on August 15, 1997.

In 2002, plaintiffs brought fraudulent conveyance actions in the United States District Court for the Southern District of New York, against non-party movants-defendants-appellees ("movants"), under New York Debtor and Creditor Laws ("DCL"), predicated upon the August 15, 1997, judgment against Briggs. In late 2002, movants initiated proceedings to vacate plaintiffs' judgment against Briggs under Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure.

The district court (Trager, J.) granted movants' motion to vacate. Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Oct. 4, 2004). The district court also dismissed the fraudulent conveyance actions, because without an uncollected judgment as a predicate, there could be no causes of action for fraudulent conveyances. Grace v. Bank Leumi, No. 04-cv-0708 (E.D.N.Y. Oct. 6, 2004); Grace v. Schwartz, No. 04-cv-1622 (E.D.N.Y. Oct. 6, 2004).

We affirm.

## Background

Prior to 1985, Briggs was a publicly-held auto-leasing company incorporated in New York. Robert Rosenstock, his father Edward Rosenstock, and Robert Genser ("Genser") were officers and directors of Briggs and owned, respectively, approximately 64 percent, 3 percent, and 5 percent of its outstanding stock. In January 1985, Robert Rosenstock and Genser decided to take Briggs private in a freeze-out merger.[1] They incorporated BAC and planned to merge BAC and Briggs, buy out Briggs's minority shareholders, and make Briggs the surviving corporation. Rosenstock and Genser contributed all of their Briggs shares to BAC. Rosenstock purchased his father's shares of Briggs stock and contributed them to BAC. As a result, BAC owned 72 percent of the stock of Briggs, with Rosenstock and Genser owning all of the stock of BAC.

Briggs outlined a plan for a merger with BAC in a January 1985 proxy statement to its shareholders. All shareholders would be bought out at $1.50 per share. Eighty-six percent of the minority shareholders, including named plaintiffs, filed notices of election to dissent. A February 1985 special meeting approved the merger based solely on BAC's vote. At the meeting, plaintiffs voted their shares against the merger. The merger was nevertheless consummated on February 26, 1985, when Rosenstock and Genser became the sole holders of Briggs shares, owning approximately 93 percent and 7 percent, respectively.

On May 20, 1985, plaintiffs brought an appraisal action against Briggs in the Supreme Court of the State of New York, Nassau County, to fix the fair value of their

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[1] Under New York's Business Corporation Law ("BCL"), a merger may be authorized by the affirmative vote of two-thirds of the corporation's shares. See NY BCL § 903(a)(2) (McKinney 2006).

shares as dissenting shareholders.[2] Briggs answered this action through counsel on July 23, 1985. Plaintiffs also notified the state court of their intention to file a federal action and requested that their appraisal action be held in abeyance pending the final determination of their case in federal court. The state court did so on October 7, 1985. Plaintiffs then commenced a federal action, asserting individual, class, and derivative claims for "equitable and other relief," in an amended complaint dated July 1, 1985. They named Robert Rosenstock, Genser, Edward Rosenstock, Briggs, and BAC as defendants. They alleged, *inter alia,* violations of the Securities Exchange Act of 1934, the New York Business Corporation Law ("BCL"), and fiduciary duties. They also brought derivative actions on behalf of Briggs against Robert Rosenstock, Genser, and Edward Rosenstock, for allegedly using corporate funds for personal expenses and diverting corporate opportunities to competing companies they owned. They requested that the class action be certified, the merger be set aside, the terms of the merger be reformed, the defendants "account for the damages suffered by Briggs and the profits and benefits enjoyed by the individual defendants by reason of [their wrongful conduct]," and the court give "such other, further, and different relief as may be just, including damages, together with costs, disbursements and a reasonable fee for plaintiffs' attorneys." Defendants Robert Rosenstock, Genser, and Edward Rosenstock answered this complaint on July 22, 1985, and Briggs answered separately, also on July 22, 1985. Briggs and the individual defendants were represented by different attorneys.

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[2] This action was brought under New York's BCL. See NY BCL § 623(h)(1) (McKinney 2006). The named plaintiffs owned approximately 1.25 percent of Briggs stock prior to the merger, and the class owned about 14 percent, roughly equivalent to 83,402 shares.

In an August 14, 1986, memorandum and order, the district court (Costantino, J.) granted plaintiffs' motion for class certification. Grace v. Rosenstock, No. cv-85-2039 (E.D.N.Y. Aug. 14, 1986) ("Grace I").[3] In January 1988, Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey ("Finley Kumble"), the law firm that represented Briggs, declared bankruptcy, leaving Briggs without legal representation. Michael Rosen, the attorney for the individual defendants, determined that Briggs and his clients had a conflict of interest, and he could therefore not represent Briggs. Briggs did not appear by counsel for the next five years. Meanwhile, on January 19, 1989, an order of discontinuance was entered by the United States District Court for the Eastern District of New York (Costantino, J.), because the court received a report stating that the action had been settled. Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Jan. 19, 1989) ("Grace II"). In fact, Halperin v. Rosenstock, No. 85-cv-1258, an action brought by Robert Rosenstock's sister and brother-in-law (also Briggs minority shareholders), had settled. This settlement inadvertently led Judge Costantino to close Grace I.

Four years later, on March 1, 1993, plaintiffs moved to set aside the order of discontinuance and reopen Grace I. On March 24, 1993, an order from the United States District Court for the Eastern District of New York (Raggi, J.) held that Grace I had been closed in error and reopened it. Grace v. Rosenstock, No. cv-85-2354 (E.D.N.Y. Mar. 29, 1993) ("Grace III"). Plaintiffs then moved for a default judgment against Briggs and BAC on the issue of liability, and for an inquest after discovery to determine the amount of damages to

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[3] Because of the long and complex procedural history in this case, each of the federal court decisions has been assigned, in chronological order, a roman numeral for the purposes of this opinion. For ease of reference we attach an appendix identifying Grace I through XIII.

be included in the judgment. Michael Rosen filed a motion to withdraw as counsel for defendants in June 1993. Genser obtained new counsel. Briggs and Rosenstock did not obtain new counsel. In 1993, pursuant to Rule 55 of the Federal Rules of Civil Procedure, default judgments were entered against Briggs and BAC, as neither corporation was represented by counsel. Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. June 8, 1993) ("Grace IV").

Almost two-and-one-half years later, in January 1996, plaintiffs moved for leave to amend the complaint, which had been filed nearly nine years earlier, to assert additional claims against the defendants and add additional defendants, including non-party movants. Plaintiffs wanted to set aside as void the allegedly fraudulent transfers to Bank Leumi, David Mack, Leo V. Berger, and Apex Marine Corporation. Plaintiffs alleged that Briggs executed promissory notes and mortgages on real property in favor of Berger and Mack, in exchange for loans. Neither party disputed that Berger and Mack paid out and loaned the full amount, but plaintiffs alleged that pursuant to Robert Rosenstock's and Genser's instructions, Berger and Mack disbursed some of the money in the loans to Rosenstock and Genser individually. The district court (Levy, M.J) issued a memorandum and order on September 30, 1996, which denied permission to add new defendants and assert new claims. See Grace v. Rosenstock, 169 F.R.D. 473, 480-86 (E.D.N.Y. 1996) ("Grace V"). Judge Levy reasoned that the new claims did not relate back to the original complaint, in part because they set forth "a completely new set of operational facts." Id. at 481. Judge Levy also denied plaintiffs' arguments on equitable tolling and equitable estoppel, explaining, "although plaintiffs complain that they did not learn of the alleged fraudulent conveyances until late 1995, they clearly could have learned of the note and mortgage transactions earlier had they been more diligent in noticing depositions or seeking court intervention regarding discovery." Id. at 484.

Judge Trager affirmed Judge Levy's order in its entirety, Grace v. Rosenstock, No. 85-cv2039 (E.D.N.Y. Nov. 7, 1996) ("Grace VI"), and on February 28, 1997, plaintiffs were denied leave to take an interlocutory appeal. On July 28, 1997, the parties attended a status conference before the district court (Wolle, J.). According to plaintiffs, "the only parties that were then appearing before Judge Wolle were the party of plaintiffs, plaintiff *[sic]* Rosenstock, pro se and Briggs Leasing by Mr. Rosenstock." Plaintiffs entered into a stipulation of settlement dated July 31, 1997, as to their claims against defendants Robert Rosenstock and Briggs. Rosenstock, who according to plaintiffs was judgment-proof, executed the stipulation on behalf of himself for $6,912,288, and on behalf of Briggs for $4,028,000. Neither Rosenstock nor Briggs had legal representation. Judge Trager entered a judgment for these amounts against both Rosenstock and Briggs. Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Aug. 15, 1997) ("Grace VII"). The judgment declared as moot the state court proceedings against both Rosenstock and Briggs. Id.

After entry of the 1997 judgment, plaintiffs and Genser consented to have all further proceedings, including entry of any judgment, conducted by a magistrate judge. The matter was referred to Magistrate Judge Levy. Following a bench trial, Judge Levy dismissed the claims against Genser in their entirety. See Grace v. Rosenstock, 23 F. Supp. 2d 326, 337 (E.D.N.Y. Oct. 29, 1998) ("Grace VIII"). Plaintiffs appealed from the dismissal of their claims and we affirmed the judgment on August 25, 2000. See Grace v. Rosenstock, 228 F.3d 40, 421 (2d Cir. 2000) ("Grace IX"). In that case, we affirmed, *inter alia*, the order denying leave to add claims and parties, issued by Judge Levy in Grace V; the order dismissing plaintiffs' claims against Genser, issued by Judge Levy in Grace VIII; and Judge Levy's denial of other arguments

advanced by plaintiffs, including equitable estoppel and equitable tolling. Id. at 52-55.[4]

According to plaintiffs, writs of execution against Briggs and Rosenstock were returned unsatisfied. In August 2002, plaintiffs commenced separate actions in the Southern District of New York against Briggs and movants, using the unsatisfied 1997 judgment as a predicate to bringing fraudulent conveyance claims against movants, under Section 273-a of DCL. See NY CLS Dr & Cr § 273 (2006). Plaintiffs alleged that notes, guarantees, and mortgages on real property of Briggs, given to movants between 1986 and 1989, were made without fair consideration.[5] Plaintiffs argued that movants helped Robert Rosenstock loot the corporation by giving the loans directly to Robert Rosenstock and other companies he owned.

On February 13, 2004, the first fraudulent conveyance action was transferred from the United Stated District Court for the Southern District of New York (Berman, J.), to the United Stated District Court for the Eastern District of New York. Grace v. Bank Leumi Trust Co., No. 02-cv-6612, 2004 U.S. Dist. LEXIS 5294 at *6 (S.D.N.Y. Mar. 30, 2004) ("Grace X"). This had the effect of transferring the second action for fraudulent conveyance. Id. at * 17. Judge Berman reasoned that the proper venue was the Eastern District, the alleged fraudulent conveyances involved real property located in the Eastern District, the transfer promoted efficiency, and plaintiffs' choice of forum was entitled to little weight. He also

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[4] Although the Court did concede that the limitations period had not yet begun to run as to the DCL § 273-a claims, it nonetheless did not reverse because the plaintiffs were found to have waived their nonaccrual objection to the magistrate judge's ruling. Grace IX, 228 F.3d at 54.

[5] Although movants did receive proceeds of real estate sales made by Briggs, these payments were allegedly millions of dollars less than the amounts they had loaned.

called the plaintiffs' choice of forum an attempt at "judge shopping." Id. at *13.

In October 2002, movants had written to Judge Trager to request a pre-motion conference, explaining that they intended to file a motion to vacate the 1997 judgment. In 2003, movants filed motions to vacate. The district court then issued a memorandum and order, which addressed movants' arguments for vacating the judgment. Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Oct. 4, 2004) ("Grace XI"). These reasons included the following: (1) Briggs was not represented by counsel when the settlement was entered; (2) Robert Rosenstock lacked power to confess judgment against Briggs; (3) the amount of the default judgment against Briggs exceeded the relief sought against Briggs in the original complaint; and (4) the class was not notified of the settlement and a fairness hearing was not held. See id. at 9.

Judge Trager vacated the 1997 judgment as void under Rule 60(b) of the Federal Rules of Civil Procedure. He explained that it is well-settled law that a corporation may appear in the federal courts only through licensed counsel; damages for a default judgment should not be awarded without a hearing or a demonstration by affidavits establishing the facts; no inquest was held because the stipulation was the basis for entry of judgment against Briggs; rescissory damages are not available for freeze-out mergers; the amount was both excessive and different in kind from that sought in the complaint; and there was evidence of collusion between Rosenstock and plaintiffs to the detriment of movants. Grace XI, at 9-20. Judge Trager concluded, "[i]n any event, movants should not be required to suffer further legal costs to bring a summary judgment motion, while plaintiffs press forward with a 19-year-old litigation fraught with procedural errors and excessive, if not completely meritless, claims."[6] Id. at 20.

[6] Although the merits of this case were not an issue, Judge Trager nevertheless noted that "even if the Judgment were upheld,

He then dismissed the two fraudulent conveyance actions, because there was no longer a judgment on which to collect. Grace v. Bank Leumi, No. 04-cv-0708 (E.D.N.Y. Oct. 6, 2004) ("Grace XII"); Grace v. Schwartz, No. 04-cv-1622 (E.D.N.Y. Oct. 14, 2004) ("Grace XIII").

Plaintiffs filed an appeal to this Court on November 1, 2004.

## Discussion

### I. Jurisdiction

We have jurisdiction over the appeals of Grace XI, Grace XII, and Grace XIII based on 28 U.S.C. § 1291, the notices of appeal having been filed on November 1, 2004. The district court had jurisdiction over Grace XI under 28 U.S.C. § 1331, as it was an action arising under federal law. Jurisdiction in Grace XII and Grace XIII was based on Rule 69 of the Federal Rules of Civil Procedure, because they concerned the collection of a federal judgment. See Epperson v. Entm't Express, Inc., 242 F.3d 100, 107 (2d Cir. 2001); Fed. R. Civ. P. 69.

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plaintiffs would probably not survive a motion for summary judgment," Grace XI, at 19. He explained that he was skeptical that Bank Leumi did not give fair consideration for the mortgages. Id. at 20. He wrote that if Briggs was not a defendant in an action for money damages when the conveyances were made, DCL § 273-a did not apply and therefore the judgment could not affect movants. And he found that the transfers to Mack, Berger, and Apex occurred while this action was administratively closed. Id. Therefore, if they had checked the court documents (which movants said they did), they would have found that the case was administratively closed because of a pending settlement. Id.

## II. Standard of Review

Federal Rule of Civil Procedure 60(b) decisions by district courts are accorded deference. We reverse only where there has been an abuse of discretion. See Lawrence v. Wink (In re Lawrence), 293 F.3d 615, 623 (2d Cir. 2002); Nemaizer v. Baker, 793 F.2d 58, 61-62 (2d Cir. 1986).[7]

## III. Standing

Rule 60(b) states that a "court may relieve a party or a party's legal representative from a final judgment, order, or proceeding . . . ." Fed. R. Civ. P. 60(b). Here, movants are neither parties nor a party's legal representatives. However, we observed in Lawrence, 293 F.3d at 627 n.11:

> several circuit courts have permitted a non-party to bring a Rule 60(b) motion or a direct appeal when its interests are strongly affected, and we have permitted such a motion on at least one occasion. See Dunlop v. Pan Am. World Airways, Inc., 672 F.2d 1044, 1052 (2d Cir. 1982) (non-party plaintiffs had standing to invoke Rule 60(b)(6) to amend a

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[7] When we recognized in Central Vermont Public Service Corp. v. Herbert, 341 F.3d 186 (2d Cir. 2003), that "[a]lmost every Circuit has adopted de novo review of Rule 60(b)(4) motions, and we know of no Circuit that defers to the district court on a Rule 60(b)(4) ruling," we were referring to a district court judgment refusing to find a judgment void. The language that de novo review is appropriate for Rule 60(b) motions has not been adopted in this Circuit. As we explained in Lawrence, "deferential abuse of discretion review of a district court's Rule 60(b) decisions reflects both the proximity of a district court to the facts of a case and the fact that a district court typically is being asked under Rule 60(b) to revisit its own final order or decision." 293 F.3d at 623.

> federal judgment, where they were "sufficiently connected and identified with the ... Suit").

(alternation in original). In Dunlop, movants were precluded from bringing an age discrimination action because of a prior judgment to which they were not a party, but which nonetheless restricted their litigation options. We held that "on the facts of this case appellants were sufficiently connected and identified with the Secretary's suit to entitle them to standing to invoke Rule 60(b)(6)." 672 F.2d at 1052. While we limited our holding in Dunlop to the facts of that case, which are clearly distinguishable from the facts here, we rested our decision on "the principles governing standing," which, given the facts of Dunlop, were "sufficiently flexible to permit a finding of standing." Id. at 1051.

Finding that movants here were "sufficiently connected and identified with" the 1997 settlement is also in keeping with the principles governing standing. See Dunlop, 672 F.2d at 1052. Both plaintiffs and movants concur that the purpose of the 1997 stipulation was to collect money from movants. Plaintiffs argue that they laid out their strategy to obtain a judgment against Briggs in order to pursue collection of that judgment by recapturing the fraudulent conveyances from movants. This is evidenced not only by their own admissions, but also by the fact that Briggs was judgment-proof and not represented by counsel at the time of the 1993 default judgment on liability.

Today, as in Dunlop, we limit our decision to the facts of this case, and hold that where plaintiffs enter into a settlement agreement with a judgment-proof, *pro se* defendant with the intent at the time of the settlement to collect from a third party that allegedly received fraudulent conveyances, and further, they attempt to use the judgment as a predicate for a fraudulent conveyance action against the third party, the third party is "strongly affected" by the judgment and entitled to standing to bring a Rule 60(b) motion. See Lawrence, 293

F.3d at 627 n.11. This decision does not mean that similarly situated plaintiffs must automatically defend their judgments from third-party transferees. Rather, if a plaintiff holds a judgment on liability against a judgment-proof pro se defendant and hopes to use the judgment as a predicate for a fraudulent conveyance claim, she need only carry out a judicially supervised inquest to protect her judgment.

To prevail on a claim under DCL § 273-a, a plaintiff must establish ( 1) that the conveyance was made without fair consideration; (2) that the conveyor is a defendant in an action for money damages or that a judgment in such action has been docketed against him; and (3) that the defendant has failed to satisfy the judgment. See NY CLS Dr & Cr § 273a. It is not the judgment itself that plaintiffs collect from transferees. Therefore, the unsatisfied judgment, while a necessary predicate to bringing a DCL § 273-a case, is not a sword that can be directly turned upon third-party transferees. The proper remedy in a fraudulent conveyance claim is to rescind, or set aside, the allegedly fraudulent transfer, and cause the transferee to return the transferred property to the transferor. Geren v. Quantum Chem. Corp., 832 F. Supp. 728, 736-37 (S.D.N.Y. 1993). The "purpose of such an action is to force the debtor to recover property transferred for inadequate consideration so that the property can be used to satisfy the debt owed to the creditor." Id. at 736. The creditor's remedy is "limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance, and requiring that it be restored to the debtor's possession." Id. (internal quotations and citations omitted). One underlying purpose of DCL § 273-a — to prevent defendants from liquidating their assets in contemplation of an adverse judgment — would be undermined if third parties could routinely attack judgments to which they were not a party. It could add additional and potentially onerous steps to plaintiffs' litigation before they could collect on a judgment. For instance, in a hypothetical multi-plaintiff lawsuit in which

defendants are judgment-proof, some plaintiffs might pursue DCL § 273-a claims against a third-party transferee. If the hypothetical plaintiffs' judgment were vacated under Rule 60(b), a possible due process violation could be visited upon the absent plaintiffs. Here, as Judge Trager correctly acknowledged, the judgment has no res judicata or collateral estoppel effect on movants. It does, however, have res judicata effects on any plaintiffs or class members who are not a party to the fraudulent conveyance lawsuit.

In this case, however, there is a strong possibility that the predicate judgment that forms the basis of this fraudulent conveyance action is the result of a settlement process devoid of due process protections and marred by serious procedural shortcomings. There is the appearance that plaintiffs and defendants entered settlement negotiations with the mutual intent of laying the burden of compensating plaintiffs squarely on non-party movants. Should the fraudulent conveyance claims be heard on the merits, the trial court could choose not to look behind the judgment for any improprieties. We thus carve out an exceedingly narrow exception to the well-established rule that litigants, who were neither a party, nor a party's legal representative to a judgment, lack standing to question a judgment under Rule 60(b).

**IV. Timeliness**

This Circuit will not examine the merits of a judgment if the motion to set it aside was untimely. See State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 179 (2d Cir. 2004). As Judge Trager explained, Rule 60(b) motions brought pursuant to (b)(1), (b)(2), or (b)(3) must be made not more than one year after the entry of judgment. Grace XI, at 10; accord Fed. R. Civ. P. 60(b). Movants could not seek to vacate it under these first three clauses and therefore do not allege or argue mistake, newly discovered evidence, fraud, or misrepresentation. They instead rely on Rule 60(b)(4), "the

judgment is void," and Rule 60(b)(6), "any other reason justifying relief from the operation of the judgment," which do not have a one-year time limit. See Fed. R. Civ. P. 60(b).

Plaintiffs argue that movants' Rule 60(b) motion is approximately nine years too late, because their 1997 collateral attack on the appeal to the Second Circuit demonstrates they could have made this motion then. Plaintiffs' Br. at 49. Putting aside for a moment the fact that this subverts plaintiffs' opposition to movants' standing, plaintiffs also contend that movants resisted being made parties to this suit, deliberately decided not to cross-appeal from the 1998 final order, and deliberately chose to wait for over five years before bringing a Rule 60(b) Motion. Plaintiffs' Br. at 40. Plaintiffs argue that movants should have paid greater attention to a January 30, 1997, letter, from plaintiffs to Judge Trager, which argued, *inter alia,* that under controlling Second Circuit authorities, the statute of limitations for DCL § 273-a transfers in fraud of creditors does not begin to run until the defendants fail to satisfy the judgment; that plaintiffs would go to trial to obtain a judgment that was allegedly worthless because Briggs was only an empty shell; and that the mortgages were not issued for fair consideration and were therefore fraudulent. See Plaintiffs' Br. at 41-42. Therefore, plaintiffs argue that they "clearly laid out their strategy to obtain a judgment against Briggs in order to pursue collection of that judgment by recapturing the fraudulent conveyances from the transferees – here, Bank Leumi, Mack, Berger and Apex Marine Corp." Plaintiffs' Br. at 43.

Movants collaterally attacked the 1997 judgment during plaintiffs' appeal. They did so to avoid being joined as defendants in this litigation. They were not parties to this case, money was not being collected from them, and they chose this strategy among the several legal options available to them. And, they were successful. The district court agreed with their collateral attack, and they successfully avoided

being joined as defendants. See Grace v. Further, the courts below, and this Court on appeal, uniformly denied plaintiffs' attempts to bring fraudulent conveyance actions against movants. See Grace v. Grace VI; Grace IX. Therefore, it would have been a self-defeating act if movants (having been kept out of litigation) had injected themselves in the case in order to attack a judgment that did not then affect them.

A Rule 60(b)(4) motion must be made "within a reasonable time" after entry of the judgment. Fed. R. Civ. P. 60(b). "Courts have been exceedingly lenient in defining the term `reasonable time,' with regard to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void `maybe made at any time.'" State St. Bank, 374 F.3d at 179 (quoting Beller & Keller v. Tyler, 120 F.3d 21, 24 (2d Cir. 1997)). In our decision in Central Vermont Public Service Corp., the Rule 60(b) motion was not untimely although the movant had waited more than four years to bring its motion, and did so when "prompted by a suit . . . ." 341 F.3d at 188, 189. We held in State Street Bank, "where a party has previously filed a motion to vacate a default judgment that failed to raise a voidness argument and subsequently advances such an argument in a Rule 60(b)(4) motion more than a year after the entry of the default judgment, the Rule 60(b)(4) motion should be denied as untimely." 374 F.3d at 179.[8]

[8] Rule 60(b)(6) does not have a one year limit, but instead requires that the motion must be made within a "reasonable time." Fed. R. Civ. P. 60(b)(6). To determine the timeliness of a motion brought pursuant to Rule 60(b)(6), we look at the particular circumstance of each case and "balance the interest in finality with the reasons for delay." Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6, 9 (2d Cir. 1987). Notably, a Rule 60(b)(6) motion requires "extraordinary circumstances," which "typically do not exist where the applicant fails to move for relief promptly." 12 Moore's Federal Practice § 60.48[3][C]; Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 462 (2d Cir. 1994). Moore's Federal Practice does not define "promptly,"

Judge Trager distinguished the movants here from those in Beller & Keller, as the movants here had not filed any previous appeal or motion to vacate. He reasoned:

> Regardless of whether or not they theoretically had the option of doing so, they have provided a simple explanation for their actions: they waited until plaintiffs had actually sued them under DCL § 273-a. Taking into account this lenient standard, the motion was filed within a reasonable time, namely, shortly after the commencement of [the 2004 actions for fraudulent conveyances].

Grace XI, at 10. Judge Trager's observation was especially appropriate considering that the allegedly fraudulent transactions occurred nearly fifteen years earlier.

In a typical case, five years from the judgment to a Rule 60(b) motion would be considered too long by many courts. This case, however, is anything but typical. Plaintiffs created significant delay by bringing a fraudulent conveyance claim more than fifteen years after the conveyances were alleged to have been made, and five years after the judgment that they could not satisfy. Plaintiffs' argument that movants have waited too long, when movants brought this motion only weeks after plaintiffs filed this lawsuit, is unpersuasive. In this case, we are interested less in the number of years from the time of judgment, than we are in what has happened in

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instead it cites Transaero, which holds, "[n]or, in the circumstances of this case, does the fact that BAF did not learn of the entry of the default judgment for several years constitute 'extraordinary circumstances' justifying Rule 60(b)(6) relief." Id. at 462. Because we later decline to rule on the district court's granting of the Rule 60(b)(6) motion, we do not decide whether the Rule 60(b)(6) motion was timely.

between. It was well within Judge Trager's discretion to determine that the Rule 60(b) motion was timely, because being directly sued provides "good cause."

V. The Judgment is void under Rule 60(b)(4)

Movants contend that the judgment here is void for several reasons: (a) the default judgment was entered without any evidentiary hearings, detailed affidavits, or documentary evidence having been presented to the district court; (b) a corporation cannot appear pro se in federal court; (c) there were material conflicts of interest between the corporate officers negotiating the settlement agreement and the corporation itself; and (d) the judgment was in violation of Rule 54(c) of the Federal Rules of Civil Procedure because plaintiffs obtained relief in excess and different in kind from that sought in their complaint.

Plaintiffs cite Cablevision Systems New York City Corp. v. Lokshin, 980 F. Supp. 107, 112 (E.D.N.Y. 1997), for the proposition that a district court has the discretion to determine the amount of damages to be included in a default judgment by an evidentiary hearing, detailed affidavits, or documentary evidence. This is true, yet here, there were none of the above: no evidentiary hearings, no detailed affidavits, and no documentary evidence. This was because the parties settled. Plaintiffs enumerate many items that would have been included in these hearings had they taken place. In fact, plaintiffs assert that the reason that Rosenstock settled on behalf of Briggs was because plaintiffs previewed for Rosenstock the overwhelming evidence that would be used in the inquest. However, the record indicates that Judge Wolle never held an evidentiary hearing, received detailed affidavits, or considered documentary evidence. Judge Wolle held a status conference on July 28, 1997, in which plaintiffs' counsel appeared in person and Rosenstock appeared by telephone from Florida. On July 31, 1997, an order from

Judge Wolle urged the parties to continue settlement negotiations and imposed a deadline of August 4, 1997. Plaintiffs and Rosenstock then signed the stipulation of settlement, with Rosenstock acting on behalf of Briggs and himself

Judge Trager wrote that it is "well-settled" that a "'corporation may appear in the federal courts only through licensed counsel.' Grace XI, at 12 (quoting Rowland v. California Men's Colony, 506 U.S. 194, 201-02 (1993)). Judge Trager, citing Mullin-Johnson Co. v. Penn Mutual Life Insurance Co., 9 F. Supp. 175 (N.D. Cal. 1934), explained that this rule "has been applied to dismiss any action or motion filed by a corporation purporting to act fro se." Grace XI, at 12. He also found that "[a] corporation cannot execute a stipulation of settlement while appearing fro se in a federal court." Id. at 13.

Judge Trager is correct. This Court held in SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975), that "[i]t is settled law that a corporation may not appear in a lawsuit against it except through an attorney, and that, where a corporation repeatedly fails to appear by counsel, a default judgment may be entered against it pursuant to Rule 55, F[ed]. R. Civ. P." Id. at 589 (internal citation omitted); accord Jacobs v. Patent Enforcement Fund, Inc., 230 F.3d 565, 568 (2d Cir. 2000). Further, this Court held in Eagle Associates v. Bank of Montreal, 926 F.2d 1305 (2d Cir. 1991), that "we long have required corporations to appear through a special agent, the licensed attorney." Id. at 1308.

Plaintiffs attempt to invoke Schifrin v. Chenille Manufacturing Company, 117 F.2d 92 (2d Cir. 1941), arguing that even if Briggs retained an attorney, this attorney would have "merely carried out an agreement" made by defendant Rosenstock. In distinguishing this case, Judge Trager explained one of the justifications for requiring that corporations be represented by counsel: "the 'lay litigant' lacks many of the attorney's ethical responsibilities." Grace

XI, at 13 (quoting Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983)). Attorneys do not exist merely to act as information conduits or to communicate with opposing counsel. Rather, they inform, advise, counsel, explain matters of law, and do much more. It is impossible to know what role an attorney for Briggs would have played, but it is likely that she would have played some role in the negotiation beyond simply passing along information to plaintiffs, especially considering that Rosenstock and Briggs had conflicting interests. Plaintiffs argue that it is "fundamentally unfair" to leave them without a remedy, but plaintiffs brought this situation upon themselves by negotiating an extraordinarily high settlement by telephone with a bankrupt am se defendant who spoke for a bankrupt corporate shell that lacked legal counsel. Even the sole shareholder of a corporation is differently situated legally from the corporation, whose interests "'frequently overlap but are not identical in all respects.' Grace XI, at 13 (quoting Batac Dev. Corp. v. B&R Consultants, Inc., No. 98-cv-721, 2000 WL 307400, at *2 (S.D.N.Y. March 23, 2000)).

Plaintiffs do not cite any case law supporting the proposition that corporations may negotiate settlements pro se. They merely revert to their previous argument that Judge Trager had discretion under Rule 55(b)(2) to approve the settlement. However, the plain language of Rule 55(b)(2) does not support this contention. See Fed. R. Civ. P. 55(b)(2). The proper course of action for plaintiffs was to ask the court to "conduct such hearings or order such references as it deem[ed] necessary and proper," as Rule 55(b)(2) provides.

Plaintiffs' original application for a default judgment against Briggs was premised on the explicit ground that the corporation was not represented by counsel. Therefore, it is difficult to comprehend their current argument that Rosenstock was able to act for Briggs, when Briggs was found in 1993 to be without counsel, despite Rosenstock's presence.

This brings us to the third major infirmity with the 1997 judgment. The 1993 default judgment was procured by plaintiffs in part based on their argument that counsel could not represent both defendants Rosenstock and Genser, and Briggs, as there was a conflict of interest between the corporate officers and the corporation. Judge Trager explained that Rosenstock's interests were "completely adverse to that of Briggs, which had claims against him . . . . Rosenstock stood only to gain by confessing judgment on behalf of Briggs." Grace XI, at 14. Rosenstock was a shareholder and an officer, which further supports the notion that he should have been prohibited from also acting as a representative of Briggs. He had authority to make some decisions for Briggs, but not this one.

A judgment is void under Rule 60(b)(4) of the Federal Rules of Civil Procedure "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." Texlon Corp. v. Mfrs. Hanover Commercial Corp., 596 F.2d 1092, 1099 (2d Cir. 1979) (quoting 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2862 at 198 (1973)); see also Fustok v. Conticommodity Servs., Inc., 873 F.2d 38, 39 (2d Cir. 1989). In ordering the judgment following the stipulation, the district court acted in a manner inconsistent with due process of law. The court wrongly allowed Briggs, a corporation acting through Rosenstock, who was not a lawyer, to execute a stipulation of settlement while appearing pro se. Rosenstock was not acting in the interest of the corporation, but in his own when he agreed to the excessive judgment. Thus, Briggs was denied due process of law. The 1997 judgment is therefore void under Rule 60(b)(4) and is vacated.

The fourth basis comes under Rule 55(d) of the Federal Rules of Civil Procedure, which provides that in "all cases a judgment by default is subject to the limitations of Rule 54(c)." Rule 54(c) requires that a "judgment by default shall

not be different in kind from or exceed in amount that prayed for in the demand for judgment." Fed. R. Civ. P. 54(c). Judge Trager explained that the complaint here sought only equitable relief against Briggs — specifically that the merger be set aside or its terms reformed. We made a similar finding with regard to the same amended complaint:

> aside from a typical catchall paragraph that mentioned damages, the only relief requested by the amended complaint was equitable. On the claims against Briggs, it requested rescission of the merger or reformation of its terms; on the derivative claim on behalf of Briggs, it sought from the individual defendants an accounting and disgorgement of profits.

Grace IX, 228 F.3d at 51. Judge Trager concluded that New York BCL Section 623 requires an action to principally seek equitable relief, and Judge Levy also followed this logic in his dismissal of the claims against Genser. See Grace XI, at 17; Grace VIII, at 336. According to Judge Trager, awarding damages as part of the default judgment violates Rule 54(c) as "different in kind" from "that prayed for in the demand for judgment." Id. at 16 (internal quotation marks omitted). However, because we have already found that the judgment is void, for the reasons discussed above, we need not reach this issue.

VII. We decline to reach the Rule 60(b)(6) argument

Judge Trager found that the excessiveness of the judgment, "combined with its close resemblance to the sale price of the Briggs real property in 1990," demonstrated "collusion between Rosenstock and plaintiffs to the detriment of movants." Grace XI, at 18. This collusion,

Judge Trager explained, was an extraordinary circumstance and an undue hardship under Rule 60(b)(6), and therefore, he argued, the judgment should be voided on that basis. Having affirmed the district court's decision on the Rule 60(b)(4) motion, we decline to address this issue.

## Conclusion

For the foregoing reasons, we affirm the order and memorandum of the district court in Grace XI, which granted non-party movants' motion to vacate the judgment. As there is no judgment on which to collect, we must also affirm the two orders, Grace XII and Grace XIII, which dismissed plaintiffs' fraudulent conveyance actions.

**Appendix**

Grace I
Grace v. Rosenstock, No. cv-85-2039 (E.D.N.Y. Aug. 14, 1986) (memorandum and order granting plaintiffs' motion for class certification).

Grace II
Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Jan. 19, 1989) (order of discontinuance entered for Grace I).

Grace III
Grace v. Rosenstock, No. cv-85-2354 (E.D.N.Y. Mar. 29, 1993) (order holding that Grace I was discontinued in error and reopening the case).

Grace IV
Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. June 8, 1993) (default judgments entered against Briggs and BAC; neither corporation was represented by counsel).

Grace V
Grace v. Rosenstock, 169 F.R.D. 473, 480-86 (E.D.N.Y. 1996) (memorandum and order denying plaintiffs permission to add new defendants and assert new claims).

Grace VI
Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Nov. 7, 1996) (order affirming Grace V in its entirety and denying plaintiffs leave to take an interlocutory appeal).

Grace VII
Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Aug. 15, 1997) (judgment entered against Rosenstock and Briggs).

Grace VIII
Grace v. Rosenstock, 23 F. Supp. 2d 326 (E.D.N.Y. Oct. 29, 1998) (order dismissing the claims against Genser in their entirety).

Grace IX
Grace v. Rosenstock, 228 F.3d 40 (2d Cir. 2000) (affirming Grace V and Grace VIII).

Grace X
Grace v. Bank Leumi Trust Co., 2004 U.S. Dist. LEXIS 5294 (S.D.N.Y. Mar. 30, 2004) (fraudulent conveyance action transferred from the Southern District to the Eastern District of New York).

Grace XI
Grace v. Rosenstock, No. 85-cv-2039 (E.D.N.Y. Oct. 4, 2004) (order vacating the default judgment against non-party movants).

Grace XII and Grace XIII
Grace v. Bank Leumi, No. 04-cv-0708 (E.D.N.Y. Oct. 6, 2004); Grace v. Schwartz, No. 04-cv1622 (E.D.N.Y. Oct. 14, 2004) (orders dismissing the two fraudulent conveyance actions brought by plaintiffs against non-party movants).

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

Docket Number: 04-5824-cv
Short Title: Grace v. Bank Leumi Trust Co.
DC Docket Number: 04-cv-708
DC: EDNY (BROOKLYN)
DC Judge: Honorable David Trager

At a stated Term of the United States Court of Appeals for the Second Circuit, held on the 30th day of May, two thousand and six.

Lorraine G. Grace, et al.
Plaintiffs-Appellants,

v.

Bank Leumi Trust Company of New York, David Mack, the Estate of Leo V. Berger, Apex Marine Corp., Harvey Schwarz, Phyllis Sepe and Sigmund Kassap, Trustee of the Leo V. Berger Grantor Trust No. 1 as Personal Representative of the Estate of Leo v. Berger
Non-Party Movants-Defendants-Appellees

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Lorraine G. Grace, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**
It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.
For the Court,
Roseann B. MacKechnie, Clerk
By: /s/
Motion Staff Attorney
**Filed May 30, 2006**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LORRAINE GRACE, et al.,

Plaintiffs,

-against –

ROBERT ROSENSTOCK, ROBERT GENSER, EDWARD ROSENSTOCK, BRIGGS. LEASING CORP. and BRIGGS ACQUISITION CORP.,

Defendants.

MEMORANDUM AND ORDER
85-CV-2039 (DGT)

TRAGER, J.

Non-parties Bank Leumi USA ("Bank Leumi"), David Mack ("Mack"), Estate of Leo V. Berger, and Xepa Marine Corp.[1] (collectively "movants") have filed this motion pursuant to Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure to vacate the judgment entered by this court on August 15, 1997 (the "Judgment") against Briggs Leasing Corp. ("Briggs"). Movants are transferees of allegedly fraudulent transfers made by Briggs while this action was pending.

**Background**

This action stemmed from a corporate merger that occurred in 1985. Prior to the creation of Briggs Acquisition Corp. ("BAC"), Robert Rosenstock, Robert Genser ("Genser"), and Edward Rosenstock ("Edward") collectively owned approximately 72% of Briggs. In January, of 1985,

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[1] Xepa Marine Corp. was formerly called Apex Marine Corp.

Robert Rosenstock and Genser contributed all their stock in Briggs to BAC, a shell corporation they had formed, in exchange for common stock of BAC. Robert Rosenstock purchased Edward Rosenstock's shares in Briggs, and contributed them to BAC in exchange for shares in BAC. Briggs sent a proxy statement to shareholders in January 1985, outlining a plan for a merger with BAC, under which all shareholders (other than BAC) would be bought out at $1.50 per share. (Joint Appendix ("A") 449-459). Approximately 86% of the minority shareholders – representing roughly 24% of Briggs – including the named plaintiffs, filed notices of election to dissent. (A66 6). A special meeting was held in February of 1985, at which the merger was approved solely on the basis of BAC's vote. BAC and Briggs were merged, and Genser and Robert Rosenstock became the sole remaining shareholders of Briggs, with Robert Rosenstock owning 93% of the common stock..

On May 20, 1985, plaintiffs[2] brought an appraisal action against Briggs in the Supreme Court of the State of New York, County of Nassau, to fix the fair value of petitioners' shares as dissenting shareholders under section 623 of the Business Corporation Law (Index No. 13312) ("the appraisal proceeding"). (A65-69). In their petition, plaintiffs notified the state court of their intention to file a federal action, and "request[ed] that prosecution of [the appraisal] action be held in abeyance pending the final, determination of an action in federal court." (A68 14).

Plaintiffs then also commenced this action. In their Amended Complaint dated July 1, 1985, plaintiffs asserted

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[2] The term "plaintiffs" will be used to refer interchangeably to the named plaintiffs who commenced this action in 1985, to the named plaintiffs after the substitution of the executrix of the estate of Oliver Grace and the trustee for the Morgan Grace trusts for Oliver Grace and the plaintiff class of Briggs' shareholders who voted against the merger.

individual, class, and derivative claims for "equitable and other relief." The named plaintiffs owned approximately 1.25% of Briggs stock prior to the merger, and the Morgan Grace, and to class owned approximately 14%.[3] Plaintiffs named Robert Rosenstock, Genser, Edward Rosenstock, Briggs,. and BAC as defendants. Plaintiffs alleged violations of Section 10(b) of the Securities Exchange Act of 1934, including that the proxy statement had understated the market value of Briggs' real estate, which in 1985 was "in excess of $2 million" (Am Compl. ¶ 18(b)), the proxy statement failed to disclose an offer made to acquire all the stock of Briggs for $3 per share (Am. Compl. 18(f), and the proxy statement failed to disclose the existence of legal claims of Briggs against Robert Rosenstock, Genser, and Edward Rosenstock.[4] Plaintiffs requested that the merger be set aside and that the terms of the merger be reformed so they are "just, fair and equitable." (A41). Plaintiffs also brought derivative claims on behalf of Briggs against Robert Rosenstock, Genser, and Edward Rosenstock for using corporate funds for personal expenses, and for diverting corporate opportunities to competing companies they wholly owned.

On October 7, 1985, at the request of plaintiffs' counsel,[5] the state court stayed the appraisal proceeding pending resolution of this federal action. (A76). On February 11, 1986, Briggs's motion for a stay of this action pending the disposition of the state court appraisal proceeding was denied (Constantino, J.). (A76-78) ("The pursuit of an appraisal proceeding generally

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[3] Briggs had 595,728 shares of common stock outstanding immediately prior to the merger, and so approximately 14% of Briggs would equal approximately 83,402 shares.

[4] Edward Rosenstock passed away while the action was pending, and his estate was not substituted for him. (A114; A121).

[5] Leventritt Lewittes & Bender have represented plaintiffs through all stages of this litigation.

constitutes the dissenting shareholder's exclusive remedy. An exception exists however, when the merger is unlawful or fraudulent as to that shareholder in which event an action for equitable relief is authorized." (quoting Alpert v. 28 William Street Corp., 63 N.Y.2d 557, 568, 483 N.Y.S.2d 667 (1984))). By order entered August 14, 1986, plaintiffs' motion for class certification was granted.

On January 19, 1989, an order of discontinuance was entered, which stated: "[i]t has been reported to the court that the above captioned action has been settled." (Supplemental Appendix 14). According to plaintiffs' counsel, however, there was no settlement in this case. What appears to have occurred is that a related case, Halperin v. Rosenstock, 85-cv-1258, brought by Robert Rosenstock's sister and brother-in-law, who were also minority shareholders in Briggs prior to the merger, did settle. That settlement somehow inadvertently led Judge Constantino to administratively close this case. (A246). Four years later, on March 1, 1993, plaintiffs moved to set aside the order of discontinuance and reopen the case. On March 19, 1993, Judge Raggi held the case was closed in error, and the case was reopened. (A5).

On June 11, 1993, plaintiffs moved for a default judgment against Briggs and BAC on the issue of liability, and for an inquest to be held after discovery was completed to determine the amount of damages to be included in the default judgment. On November 30, 1993, a default judgment against the corporate defendants was granted (Johnson, J.). The case was reassigned to me on January 21, 1994, upon my appointment.

In January 1996, plaintiffs moved for leave to amend the complaint to assert additional claims against the existing defendants, and against proposed additional defendants, including movants. Among the proposed additional claims were claims under New York's Debtor and Creditor Law ("DCL") § 273-a. Plaintiffs sought to set aside as void the allegedly "fraudulent

transfers to Bank Leumi, David Mack, Leo V. Berger and Apex Marine Corp." (A196). By memorandum and order dated September 30, 1996, Magistrate Judge Levy ruled on plaintiffs' motion to amend and supplement their complaint. In particular, he denied permission to add new defendants and assert fraudulent conveyance claims, holding that such claims were time-barred. Magistrate Judge Levy's order was affirmed in its entirety by this court (Trager, J.) on November 6, 1996. On. February 27, 1997, plaintiffs were denied leave to take an interlocutory-appeal..

The case was referred to visiting Judge Wolle for trial, and he encouraged the parties to settle. Plaintiffs entered into a Stipulation of Settlement dated July 31, 1997. (A392). The stipulation was executed by Robert Rosenstock, both on his own behalf and for Briggs, which was not represented by counsel. In the stipulation, Robert Rosenstock agreed to the entry of a judgment of $6,912,288 against himself, and to the entry of a judgment of $4,028,000 against Briggs. In August 1997, a judgment was entered against Robert Rosenstock and Briggs in the agreed amounts (the "Judgment") (Trager, J.). (A390). The Judgment also declared the state court appraisal proceeding moot.

The case against Genser remained open. Following a bench trial before Magistrate Judge Levy, all claims against Genser were dismissed in their entirety in a Memorandum and Order dated. October 29, 1998. See Grace v. Rosenstock, 23 F.Supp2d 326 (E.D.N.Y. 1998). Judge Levy noted that "[a]ccording to plaintiffs, the fair value of Briggs, based on the true value of its real estate holdings at the time, was in excess of $5.00 per share." Id. at 329. Judge Levy held that no damages were caused by the content of the proxy statement since BAC owned over 50% of the shares, and the plaintiffs voted against the merger, preserving all their state law remedies: Id. at 334.

Plaintiffs appealed from the dismissal of claims against Genser and the denial of leave to amend their complaint to add claims against the transferees of the allegedly fraudulent conveyances. The Second Circuit affirmed the judgment on August 25, 2000. Grace v. Rosenstock, 228 F.3d 40 (2d Cir. 2000). In affirming the dismissal of claims against Genser, the Second Circuit emphasized that "[p]laintiffs cite no case applying New York law, and we know of none, that authorizes an award of rescissory damages for a freeze-out merger as to which a dissenting shareholder had a right of appraisal." Id. at 50. In upholding the denial of leave to amend the complaint, the Second Circuit found that plaintiffs had not timely raised the argument that a claim under DCL §273-a only accrues when a: judgment is entered, and therefore "waived their nonaccrual objection to the magistrate judge's ruling." Id. at 54. Additionally, the Second Circuit also held that it would be inappropriate for the district court to exercise supplemental jurisdiction over a state law claim since all federal claims had been dismissed. Id. at 55. The decision went on, however, to note that "generally the denial of leave to bring in new defendants does not have preclusive effect with respect to the claims against those defendants." Id. at 56 (citations omitted).

In August 2002, plaintiffs commenced a separate action in the Southern District of New York against Briggs and movants ("Grace #2"). The complaint asserted federal jurisdiction based on Fed. R. Civ. P. 69, pertaining to the process for enforcing a judgment obtained in federal court. (Grace #2 Am. Compl. 3). Plaintiffs alleged that notes, guarantees, and mortgages on real property of Briggs given to movants between 1986 and 1989 were made without fair consideration because almost all of the proceeds of the loans given by the movants in exchange went directly to Robert Rosenstock and other companies wholly or partially owned by him. When the real estate was sold by Briggs in 1990, the proceeds of the sale were paid to the holders of the mortgages, with $3.1 million paid to Bank Leumi, $500,000 paid to Apex, and $500,000 paid to

Mack.[6] Due to a crash in the real estate market, these payments were millions of dollars less than the amounts loaned by movants; movants lost large sums because of Briggs' inability to repay its debts.[7] On the other hand, plaintiffs claim that movants assisted Rosenstock in looting the corporation.

In Grace #2, plaintiffs assert fraudulent conveyance claims under DCL §273-a. Section 273-a states:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages ... is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if,

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[6] Plaintiffs argue they are entitled to the amount transferred from Briggs to the movants as payments on the mortgages plus the amount of the loans. For example, they allege Apex Marine Corp. received mortgages -and notes worth $500,000 on June 27, 1989, mortgages and notes worth $250,000 On August 18, 1989, and $500,000 out of the property sale proceeds on January 16, 1990. • Plaintiffs then ask that Apex be ordered to pay $1,252,803 in damages. They also allege that Mack received a mortgage and note worth $1 million on February 10, 1989, notes and mortgages worth $500,000 on June 27, 1989, notes and mortgages worth $250,000 on August 18, 1989, and $500,000 out of th. property sale proceeds on January 16, 1990. Plaintiffs then ask that Mack be ordered to pay $2,269,583 in damages. This is clearly erroneous, as plaintiffs add together two different assessments of the value of the same conveyance. Plaintiffs engage in similarly inappropriate accounting when they treat Bank Leumi's loan to Rosenstock guaranteed by Briggs, and the repayment of that loan by Briggs, as if they were two separate conveyances for $270,000 each.

[7] For example, Mack, Berger, and Apex Marine Corp: collectively lent $3.5 million, -recovered $1 million, and consequently lost $2.5 million. (See Grace #2 Am. Compl. ¶113;17; see also Transcript of June 9, 2004 Status Conference 28). Bank Leumi similarly lost millions of dollars.

after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

Plaintiffs expressly rely on the unsatisfied 1997 Judgment as a predicate element for their claim - that fraudulent transfers were made by Briggs, arguing that Briggs had been a defendant in an action for money damages, specifically this action, when the transfers were made.[8]

In October 2002, movants initiated this motion by writing to this court to request a pre-motion conference.

On February 13, 2004, Judge Richard M. Berman ordered that Grace #2 be transferred from the Southern District to this court. Plaintiffs filed a motion with Judge Berman to reconsider and recall the transfer, which was denied on March 30, 2004. Judge Berman held venue was proper in the Eastern District, as the alleged fraudulent conveyances involved real property located in the Eastern District, the transfer promoted efficiency, and plaintiffs' choice of forum was entitled to little weight. In particular, Judge Berman noted that plaintiffs' choice of forum was apparently influenced by a desire to avoid a particular judge, and held "this attempt at `judge shopping' should be discouraged. Grace v. Bank Leumi, No. 02 Civ. 6612 (S.D.N.Y. March 30, 2004).[9]

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[8] It should be noted that David Mack, Leo Berger, and Apex Marine Corp: were given mortgages and notes in 1989, after this action had been discontinued. Movants would not have known from examining the court's docket records that, in fact, no such settlement existed. The payments on the mortgages were also made while this action was administratively closed.

[9] The same order also transferred another related case, Grace v. Harvey Schwarz et al, " No. 03 Civ. 5668 (S.D.N.Y.), in which plaintiffs brought fraudulent conveyance claims against the trustees of the Leo Berger Grantor Trust No. 1 and the personal representative of the Berger estate. The parties had previously informed Judge

## Discussion

Movants assert four reasons for vacating the judgment: (1) Briggs was not represented by counsel when the stipulation of settlement was entered; (2) Robert Rosenstock had no power to confess judgment against Briggs; (3) the amount of the default judgment against Briggs exceeds that sought against Briggs in the complaint; and (4) the class was not notified of the settlement, and no fairness hearing was held, prior to the entry of the Judgment. Each of these four claims asserts a procedural flaw which movants allege renders the Judgment void.

A judgment is void within the meaning of Rule-60(b)(4) only if the court lacked subject matter or personal jurisdiction, or acted without due process of law; a judgment is not void merely because it is erroneous. In re Texlon Corp., 596 F.2d 1092, 1099 (2d Cir. 1979). See, e.g., In re Emergency Beacon Corp., 84 B.R. 329 (S.D.N.Y. 1988); Jaffe & Asher v. Van Brunt, 158 F.R.D. 278, 279 (S.D.N.Y. 1994); National Credit Union Admin. Bd. v. Abramov, No. 93- CV-1467, 1996 WL 480791 (E.D.N.Y. 1996). Movants also bring the motion pursuant to Rule 60(b)(6). "This portion of the Rule is properly invoked only when there are extraordinary. circumstances justifying relief, when the judgment may work an extreme and undue hardship, and when the asserted grounds for relief are not recognized in clauses (1)-(5) of the Rule." Nemaizer v. Baker, 793 F.2d 58, 63 (2d Cir. 1986).

### (1)

### Timeliness

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Berman that they intended to consolidate that case with Grace #2 but the actions were never consolidated. Plaintiffs also filed a motion to reconsider this March 30, 2004 decision, which was denied by Judge Berman on April 5, 2004.

Rule 60(b) specifies that a motion to vacate a judgment pursuant to the rule must be "made within a reasonable time" and that a motion brought pursuant to Rule 60(b)(1),(2),or (3) must be made not more than one year after the entry of judgment. Since the Judgment at issue here was entered in 1997, movants cannot seek to vacate it for the reasons falling under 60(b)(1), (2), and (3), which include mistake, newly discovered evidence, fraud, and misrepresentation. Rather, movants rely on: 60(b)(4), "the judgment is void," and 60(b)(6), "any other reason justifying relief from the operation of the judgment."

Plaintiffs argue that movants "made a deliberate choice not to file a timely Rule. 60(b) motion or to file a cross appeal" after the entry of the Judgment.. (Pl. Brief in Opp. at 2.) Although movants were not parties, they were informed of and involved with the litigation at the time the Judgment was entered, and on the appeal they filed briefs supporting the denial of leave to amend. However, "[c]ourts have been exceedingly lenient in defining the term 'reasonable time' with regard to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be made at any time.'" Beller & Keller v. Tyler, 120 F.3d 21, 24 (2d Cir. 1997) (citations omitted). Although Beller & Keller v. Tyler suggested that the motion might have been untimely because the movant had previously filed a Rule 60(b)(1) motion, which was denied, then waited over a year to file a Rule 60(b)(4) motion, in this case, movants have filed no previous appeal or motion.to vacate. Regardless of whether or not they theoretically had the option of doing so, they have provided a simple explanation for their actions: they waited until plaintiffs had actually sued them under DCL §273-a. Taking into account this lenient standard, the motion was filed within a reasonable time, namely, shortly after the commencement of Grace #2.

(2)

**Personal Jurisdiction**

Plaintiffs have suggested that this court does not have jurisdiction over the present motion because it lacks personal jurisdiction over the movants, and therefore any order entered by the court would be a "nullity.[10] An objection to personal jurisdiction, however, is waivable. See Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 703 (1982). Since movants consent to the court's jurisdiction over them, plaintiffs cannot assert such an objection on their behalf.

(3)

**Standing**

Generally one must either be a party or a party's legal representative to bring a Rule 60(b) motion, because the rule states that a "court may relieve a party or his legal representative from a final judgment, order or proceeding" for specified reasons. However, as the Second Circuit observed in Lawrence v. Wink an re Lawrence):

> several circuit courts have permitted a non-party to bring a Rule 60(b) motion ... when its interests are strongly affected, and we have permitted such a motion on at least one occasion. See Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1052 (2d Cir.1982) (non-party plaintiffs had standing to invoke Rule 60(bX6) to amend a federal judgment, where they were "sufficiently connected and identified with the ... suit"); Eyak Native Village v. Exxon Cow., 25 F.3d 773, 777 (9th Cir.), cert. denied, 513 U.S. 943 (1994) (non-party

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[10] Plaintiffs make this argument in a letter dated December 3, 2003, but not in their Brief in Opposition to Non-Party Movants' Motion.

> may seek Rule 60(b) relief from a judgment procured by fraud if non-party's "interests are directly affected."); Southerland v. Irons, 628 F.2d 978, 980 (6th Cir.1980) (Rule 60(b) claim of fraud on the court may be raised by a non-party).

293 F.3d 615, 627 n.11 (2d Cir. 2002).

Movants are not parties. Instead, they claim standing as non-parties whose interests were "strongly affected" by the Judgment. As plaintiffs conceded in their brief, "Bank Leumi's interests were 'strongly affected' by plaintiffs' entry of judgmentagainst Briggs on August 15, 1997." (Pl. Brief in Opp. at 2). After oral argument, plaintiffs' counsel wrote a letter in which he argued for the first time that a Rule 60(b) motion can only relieve a party from a judgment.[11] (Letter from Sidney Bender, Esq. dated March 17, 2004). The previous denial of plaintiffs' motion to add claims against movants clearly indicates that plaintiffs entered the settlement with the intention of using the judgment against Briggs to bring claims against movants under DCL §273-a. Although the Judgment may technically have no res judicata or collateral estoppel effect on movants, they point out that they have expended substantial monies in defending themselves from plaintiffs' claims during this lengthy litigation even though they too lost substantial monies as a result of Rosenstock's actions. Thus, it is particularly appropriate that movants be allowed to challenge the validity of the Judgment by bringing this Rule 60(b) motion.



[11] This letter did not however, retreat from his admission that movants were "strongly affected" by the Judgment.

**Corporations Must be Represented by Counsel**

It is well-settled that "a corporation may appear in the federal courts only through licensed counsel." Rowland v. California Men's Colony, 506 U.S. 194, 201-202 (1993). This rule has been applied to dismiss any action or motion filed by a corporation purporting to act pro se. See, e.g., Mullin-Johnson Co. v. Penn Mut. Life Ins. Co., 9 F.Supp.175 (N.D.Cal. 1934); Batac Development Corp. v. B&R Consultants, No. 98-CV-721, 2000 WL 307400 (SD.N.Y. 2000). A corporation cannot execute a stipulation of settlement while appearing pro se in federal court, and a stipulation executed without an attorney is a nullity. Aloha Leasing v. Advanced Business Systems Unlimited, Inc., No. 93-CV-385, 1994 WL 631041 (N.D.N.Y. 1994).

The situation at bar is readily distinguished from Schifrin v. Chenille Mfg. Co., 117 F.2d 92, 93 (2d Cir. 1941). In that case, the attorney who signed a stipulation consenting to the judgment on behalf of the defendants had not actually been admitted to practice before the Southern District of New. York, and the defendants brought a motion to vacate the judgment as void. Id. The Second Circuit noted that the steps taken by the attorney "merely carried out an agreement which the individual defendants for themselves and the corporate defendant made in person with the plaintiff" and that "[d]efendant Richard Farber, as president of the defendant corporation, had power to act for the corporation." Id. The court reasoned "there are fairer ways of enforcing the district court's rule then by holding the proceedings taken pursuant to agreement of the parties themselves void, to the loss of the completely innocent party," and concluded that the judgment was not void. Id. at 95. Unlike the situation in Schifrin. Briggs is not seeking to benefit from its own failure to hire an appropriate attorney.

More significantly, Briggs was not represented by any attorney. Part of the justification for requiring corporations be represented by counsel is that "the lay litigant lacks many of the . attorney's ethical

responsibilities." Jones v. Niagara Frontier Transp. Authority, 722 F.2d 20, *22* (2d Cir. 1983). In Batac Development Corp., the court emphasized that even the sole shareholder of a corporation is a different legal person from the corporation, whose interests "frequently overlap but are not identical in all respects. Thus, requiring separate counsel for a corporation works as an independent safeguard of its interests." 2000 WL 307400 at *2. Rosenstock was hardly acting in the interests of the corporation when he agreed to such an excessive judgment. Indeed, if plaintiffs allegations are true, Robert Rosenstock's interest were completely adverse to that of Briggs, which had claims against him. In fact, Robert Rosenstock stood only to gain by confessing judgment on behalf of Briggs. Plaintiffs needed a money judgment against Briggs in order to sue movants, and any amount recovered from movants would be subtracted from Rosenstock's personal liability for the judgment.

**(5)**

**Discretion Under Rule 55(b)(2)**

Plaintiffs assert that the $4,028,000 figure Rosenstock stipulated to was a legitimate "reference" by which the court determined the amount of damages, even if the stipulation of settlement was null as to Briggs. (Brief in Opp. at 13 ("[I]t was certainly within Judge Wolle's broad discretion given to him by Rule 55(b)(2) to allow the attorney for plaintiffs and the then 93% shareholder of Briggs, Robert Rosenstock, to conduct an arms length negotiation to arrive at an amount of damages.")). Rule 55(b)(2) provides that "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages ... the court may conduct such hearings or order such references as it deems necessary and proper..." Plaintiffs overstate the discretion afforded by Rule 55(b)(2). Generally, damages for a 'default judgment should not be awarded without a hearing or a demonstration by affidavits establishing the facts, see. e.g., Tranatlantic Marine Claims Agency v. Ace Shipping Corp., 109 F.3d 105; 111 (2d Cir. 1997); United Artists Corp. v. Freeman, 605 F.2d 854, 857 (5th Cir.1979) - especially where, as here, the amount was not the result of an arms length negotiation and the entire exercise was designed to cast responsibility of an insolvent debtor, Rosenstock, on to third parties, the movants.

Furthermore, although failure to comply with Rule 55(b)(2) would not alone render a default judgment void, id. at 156, here it is apparent that no inquest was held because the stipulation, and not the default, was the basis for entry of judgment against Briggs. Although the Judgment does read in relevant part: "Since a Default judgment on the issue of Liability was entered against defendant Briggs Leasing Corporation,

judgment shall be entered in favor of the plaintiff class against the defendant Briggs Leasing Corporation in the amount of $4,028,000" (A390), the fact is that no judge made a determination that the amount was appropriate. Judge Wolle did not have a hearing or so order the stipulation, and I who signed the Judgment did so solely on the basis of the parties' consent, with no knowledge or understanding of what truly motivated and underlie the settlement.

(6)

**Rule 54(c)**

Fed. R. Civ. P. 54(c) requires that a "judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." A default judgment that exceeds \the relief sought in the complaint is void under' Rule 60(b)(4). See generally 10 Wright, Miller & Kane, Fed. Prac. & Proc. Civ. 3d § 2663 at 168-69. Except for a general catch-all provision, asking the court for "such other, further, and different relief as may be just, including damages," plaintiffs' complaint sought only equitable relief against Briggs, namely that the merger be set aside or its terms reformed. Indeed, New York Business Corporation Law § 623 requires an action principally seek equitable relief in order to be exempt from the general rule that an appraisal action is the exclusive remedy for dissenting shareholders in a freeze-out merger. As Judge Levy noted in his dismissal of the claims against Genser, "[a]lthough plaintiffs alleging fraud in an equitable proceeding under [BCL §623(k)] may also seek money damages, the equitable relief must be the primary request, and such damages must be incidental to a grant of equitable relief." 23 F.Supp.2d at 336 (citing Breed v. Barton, 54 N.Y.2d 82, 87, 444 N.Y.S.2d 609). Awarding any damages whatsoever as part of the default judgment violates Rule 54(c) as "different in kind" from "that prayed for in the demand for judgment."

Plaintiffs argue that because Briggs, through Rosenstock, "participated in the negotiations leading to the agreed amount of damages," the court is not limited to awarding relief requested in the complaint. Certainly that might be the case if Briggs had been represented by an attorney who had signed the stipulation of settlement, who presumably would have recognized his or her fiduciary obligation to Briggs and not just Rosenstock.. In any event, the stipulation was a nullity, as explained above.

Plaintiffs further argue that the judgment is not void as long as it was reasonable, for the court to accept the stipulated damages to be included in the default judgment. Plaintiffs claim the amount was reasonable because they were entitled to rescissory damages, which they characterize as equitable relief. Thus, they seem to suggest, the $4 million Judgment was not "different in kind" from that sought in the complaint. However, the complaint sought to set aside the merger, not rescissory damages. Moreover, as held by the. Second Circuit, rescissory damages are not available "for a freeze-out merger as to which a dissenting shareholder had a right of appraisal." Grace, 228 F.3d at 50.

It should be noted that the rationale for restricting money damages in a proceeding under BCL §623(k) to those ancillary to equitable relief is to prevent plaintiffs from recovering for the same damages twice: once in the appraisal proceeding and again in the §623(k) action. Here the stipulation of settlement expressly provided for the appraisal proceeding to be declared moot, suggesting that the stipulated amount was meant to settle both proceedings simultaneously. However, this court was never provided with the information necessary to determine whether the stipulated damages were reasonable in light of the governing legal rules under New York law — i.e. the fair market value of plaintiffs' shares.

In sum, since the stipulation was a nullity as applied to Briggs, the amount in the default judgment was never determined in relation to plaintiffs' actual damages, and the amount was both excessive and different in kind from that sought in the complaint, the Judgment against . Briggs is void.

(7)

**Rule 23(e)**

Despite movants' standing to bring this motion, they are not entitled to assert claims on behalf of absent class members *as a means* of depriving those class members of any recovery. However, plaintiffs' failure to comply with Rule 23(e) is just one more example of the many procedural improprieties that have plagued this litigation, and one which this court can take cognizance of when considering the application to set aside the Judgment.

Rule 23(e) requires that notice of a proposed compromise be given to all members of the class. Rule 23(e) also requires that settlements be approved by the court after a hearing. Plaintiffs argue that both Judge Wolle and myself "understood the realities of the situation. There was no cash obtained by the settlement," and, consequently, no need to notify class members. (Brief in Opp. at 23). However, the danger to the rights of absent class members, who are bound by final judgments, is only increased by the fact they received no cash and the judgment-proof status of the defendants. Moreover, while I cannot speak for Judge Wok, I have no hesitation in saying that I was not informed nor had any appreciation at the time I signed the consent judgment of the legal stratagems that were being employed.

**(8)**

**Collusion**

Even if Rosenstock's lack of authority to enter the stipulation did not render the Judgment void under Rule 60(b)(4), the excessiveness of the four million dollar plus Judgment, combined with its close resemblance to the sale price of the Briggs real property in 1990, show collusion between Rosenstock and plaintiffs to the detriment of movants.. This constitutes an extraordinary circumstance and an undue hardship to movants justifying relief from the Judgment under 60(b)(6).[12]

Bank Leumi strongly implies that it believes the Judgment was obtained through collusion:

> WJhile Bank Leumi does not need to prove 'collusion' between plaintiffs and Rosenstock with respect to Rosenstock's purported agreement on Briggs' behalf to entry of the $4 million judgment against Briggs as part of the Stipulation of Settlement – in which Rosenstock, whom plaintiffs concede is judgment-proof, expressly agreed 'to appear and give testimony' in [Grace #2] on plaintiffs' behalf, and at plaintiffs expense –plaintiffs' motivation for obtaining the money Judgment against Briggs when they did could not be clearer.

(See Mem. of Law of Bank Leumi in Supp. at 15 n.8.) The other movants assert collusion directly. (Mem. of Law in Supp. at 6 ("[T]he amount of the judgment agreed to by Rosenstock is-so excessive as to strongly suggest fraud and collusion between Rosenstock and the plaintiffs.")) The movants suggest "the

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[12]Although this kind of collusion is similar to fraud, it does not fall squarely under Rule 60(b)(3), and therefore relief under Rule 60(b)(6) is not time-barred.

maximum amount of plaintiffs' actual damages could amount to little more than $250,000," assuming that plaintiffs owned, pre-merger, 28% of the stock, and estimating a fair market value of $3 per share, which was the amount allegedly offered by a. potential buyer. (Ids.) In fact, plaintiffs collectively owned about 14% of the stock, or approximately 83,402 shares. At the Genser trial before Magistrate Judge Levy, plaintiffi took the position that "the fair value of Briggs. . . was in excess of $5.00 per share." 23 F.Supp.2d at 329. That being so, plaintiffs' damages would be at most $418,000 (assuming the fair market value was $6.00 per share).

"Rule 60(b)(6) 'should be liberally construed when substantial justice will thus be served."' First Fidelity Bank, 877 F.2d 189, 196 (2d Cir. 1989) (quoting Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963)).. With this goal of "substantial justice" in mind, it is worth noting that even if the Judgment were upheld, plaintiffs would probably not survive a motion for summary judgment in Grace #2. If Briggs was not "a defendant in an action for money damages" at the time the conveyances at issue in Grace #2 were made, DCL §273-a does not apply, and the Judgment has no affect on the liability of movants. Movants argue that "the Amended Complaint sought no money damages from Briggs whatsoever." (Mem. of Law of Bank Leumi in Supp. at 18). Additionally, the transfers to Mack, Berger, and Apex Marine Corp. occurred while this action was administratively closed. While it is unclear when precisely movants became aware of the existence of this lawsuit, had they checked the court documents in 1989 or 1990, they would have seen that the case was administratively closed because of a pending settlement.[13]

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[13]Counsel represented that when Mack and Berger made loans to Briggs, they "did all of their due diligence at the time recommended by counsel, ... due diligence showed there was no outstanding lawsuits." (Transcript of June 9, 2004 Status Conference 27).

Furthermore, conferences with the parties have given rise to skepticism that plaintiffs can show Bank Leumi did not give fair consideration for the mortgages. (See, e.g., Transcript of Nov. 21, 2002 Status Conference 23; Transcript of June 9, 2004 Status Conference 11-14). In any event, movants should not be required to suffer further legal costs to bring a summary judgment motion, while plaintiffs press forward with a 19 year-Old litigation fraught with procedural errors and excessive, if not completely meritless, claims.

**Conclusion**

Accordingly, the motion to vacate the Judgment is granted.

Dated: Brooklyn, New York
October 4, 2004

SO ORDERED:

/s/

David G. Trager
United States District

Judge

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

LORRAINE GRACE, et al., Plaintiffs,

-against-

BANK LEUMI TRUST CO. OF NEW YORK, et al., Defendants.

----------X

**ORDER**
**04-CV-0708 (DGT)(KAM)**

TRAGER, J.

Plaintiffs brought this action to "collect their federal judgment of $4,028,000 against Briggs" entered in Grace, et al. v. Rosenstock, et al., No. 85-cv-2039 ("Grace #1). (Compl. ¶1.) Plaintiffs brought fraudulent conveyance claims under New York's Debtor Creditor Law§273-a, which states:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages . . . is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

On October 4, 2004, defendant's motion to vacate the $4,028,000 judgment entered in Grace #1 against Briggs was granted. Accordingly, there is no longer a judgment on which to collect, and this action is hereby dismissed sua sponte. The Clerk of the Court is directed to close the case.

Dated:
Brooklyn, New York
October 6, 2006

SO ORDERED:
/s/
David G. Trager
United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

LORRAINE GRACE, et al.,

Plaintiffs,

-against-

HARVEY SCHWARTZ, et al.,

Defendants.

----------X

**ORDER**
**04-CV-1622 (DGT)(KAM)**

TRAGER, J.

This is an action to "collect plaintiffs' federal judgment against Briggs of $4,028,000," entered in Grace, et al. v. Rosenstock, et al., No. 85-cv-2039 ("Grace #1"). (Compl. ¶1). Plaintiffs brought fraudulent conveyance claims under New York's Debtor Creditor Law §273-a, which states:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages . . . is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

On October 4, 2004, defendant's motion to vacate the $4,028,000 judgment entered in Grace #1 against Briggs was granted. Accordingly, there is no longer a judgment on which to collect, and this action is hereby dismissed sua sponte. The Clerk of the Court is directed to close the case.

Dated: Brooklyn, New York
October 6, 2004

SO ORDERED:
/s/
David G. Trager
United States
District Judge

## CONSTITUTION, STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Section 2 of Article III of the Constitution provides:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

Federal Rule 55 of Civil Procedure entitled "Default", a pertinent part provides:
(b) **Judgment**. Judgment by default may be entered as follows: X X X
(2) **By the Court.** . . .
If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Federal Rule 60(b) of Civil Procedure – in pertinent part – provides:

Rule 60. Relief From Judgment or Order x x x

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for

obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

New York Debtor and Creditor law, § 273-a entitled **"Conveyances by defendants"** provides:

Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

----------x

LORRAINE GRACE, et al.,

**Plaintiffs,**

-against-

BANK LEUMI TRUST COMPANY OF NEW YORK, et al.,

**Defendants.**

----------x

**02-CV-6612 (RMB)**
**AMENDED COMPLAINT**

Plaintiffs, by their attorneys, LEVENTRITT LEWITTES & BENDER, as and for their Complaint herein allege as follows:

1. Plaintiffs class (sometimes "plaintiffs") hold a federal judgment for the amount of $4,028,000 against defendant Briggs Leasing Corporation ("Briggs"), a nominal defendant in this action. This is a civil action by plaintiffs' judgment creditors to set aside fraudulent conveyances of money, mortgages and notes, without consideration or for an unfair consideration, by Briggs to

defendants Bank Leumi Trust Company of New York ("Bank Leumi"), David Mack ("Mack"), Leo V. Berger (who died after the transfers in fraud of plaintiffs; the Estate of Leo v. Berger is the named party, hereinafter "Berger"), and Apex Marine Corp. ("Apex") and to collect plaintiffs' federal judgment against Briggs of $4,028,000 plus post-judgment compound annual interest of 5.58% or $1,258,272 for a total of $5,286,272 by requiring (i) defendant transferee Bank Leumi to pay plaintiffs $5,286,272 that it owes Briggs, (ii) defendant transferee Mack to pay plaintiffs $2,269,583 that he owes Briggs, (iii) defendant transferee Berger to pay plaintiffs $1,000,000 that he owes Briggs, and (iv) defendant transferee Apex to pay plaintiffs $1,252,803 that it owes Briggs. Inasmuch as the Supreme Court of the State of New York, County of Nassau entered a judgment in 1992 in favor of Bank Leumi against Briggs, *inter alia*, based on Briggs' fraudulent conveyances to Bank Leumi, that that judgment, as a matter of equity, be set aside. To the extent that Briggs gave any guarantees to Bank Leumi, Mack, Berger and Apex on loans by them to Robert Rosenstock personally, RER Motors, Inc. (a company owned by Rosenstock and Genser), or 51 Great Neck Road Associates, those guarantees should be rendered void as being without consideration or for an unfair conside. ation.

2. On August 15, 1997, a judgment was entered in favor of the plaintiffs class, *inter alia*,

against defendant Briggs in the amount of $4,028,000 and against Robert Rosenstock in the amount of $6,912,288 in an action in the United States District Court for the Eastern District of New York, Index No. 85-CV-2039 (DGT) (hereinafter "Grace #1"). No appeal was filed from that judgment; it was not modified or altered on appeal and is a final judgment. As a result of that litigation in Grace #1, plaintiffs are judgment creditors. Nothing has been collected from either of those judgment debtors, Briggs and Rosenstock. In fact, a writ of execution against Briggs by plaintiffs as judgment creditors was returned unsatisfied on March 10, 1998. Also, a writ of execution against Rosenstock was returned unsatisfied.

3. Jurisdiction over this case is founded on the enforcement of a judgment obtained in a federal court, the United States District Court for the Eastern District of New York, and arises out of Rule 69 of the Federal Rules of Civil Procedure which provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution... The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the

> district court is held, existing at the time the remedy is sought...

The judgment in the Grace #1 litigation against Briggs was for the payment of money. That money judgment was entered in a federal court. On January 8, 2002, the Clerk of the United States District Court for the Eastern District of New York issued a Certification of Judgment for Registration In Another District (attached hereto as Exhibit A) with respect to the August 15, 1997 judgment entered in the Grace #1 litigation. Rule 69 requires that the practice and procedure of New York State be followed in this case "in proceedings" that aid execution and are in aid of a judgment. New York State's Civil Practice Law and Rules (CPLR) § 5225 entitled, "Payment or delivery of property of judgment debtor," and specifically the governing provision is § 5225(b), "Property not in the possession of judgment debtor." Plaintiffs judgment creditors have commenced this special proceeding against these defendants (other than Briggs) who are transferees of money, notes, mortgages, or other personal property from Briggs without fair consideration because the judgment debtor is entitled to the possession of such money and property or the plaintiff judgment creditors' rights to the property are superior to those of the transferee defendants.

4. Inasmuch as plaintiffs class, as judgment creditors, have been unsuccessful in collecting any money on their judgment against

Briggs and against Rosenstock, plaintiffs class are now suing on that August 15, 1997 judgment against Briggs to collect the $5,286,272 directly from the other defendants on the ground that those defendant transferees received in excess of that amount in money, mortgages, and notes from Briggs in transactions during the Grace #1 litigation that were not supported by fair consideration. Therefore, judgment debtor Briggs has an interest in the money and property transferred to the defendants without fair consideration.

5. Plaintiffs class were shareholders of Briggs, a public New York corporation, at the time of the fraudulent transfers by Briggs during the Grace #1 litigation. Briggs was engaged in the business of leasing automobiles to individuals and businesses. The plaintiffs class is exactly the same as when the August 15, 1997 judgment was entered except that the Estate of Morgan H. Grace was terminated and its interest was transferred by operation of law to: (i) Gerald I. White, Trustee U/W Morgan H. Grace for the Marital Deduction Trust, (ii) Gerald I. White, Trustee U/W Morgan H. Grace for the Non-Marital Deduction Trust and (iii) Gerald I. White, Trustee U/W Morgan H. Grace for the Generation Skipping Trust. Briggs is the only defendant in this case that was a party defendant in the Grace #1 litigation.

6. The principal transaction alleged in the Grace #1 litigation involved the freeze-out merger on or about February 26, 1985, of the

minority shareholders of Briggs by the self-interested majority defendant shareholders, Robert Rosenstock and Robert Genser, without business purpose and at a totally unfair price (hereafter referred to as "The Merger"). That Grace #1 litigation was brought under the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78 (j) and Rule 10b-5) and for breach of fiduciary duty under the laws of New York State.

7. During the Grace #1 litigation, Rosenstock and Genser designed and implemented fraudulent transactions whereby they caused Briggs to transfer money, mortgages and notes to defendants Bank Leumi, Mack, Berger and Apex without consideration or without fair consideration to the detriment of Briggs and plaintiffs minority class.

8. Upon information and belief, defendant Bank Leumi is a New York corporation which has its principal place of business at 139 Centre Street, New York, New York.

9. Upon information and belief, defendant Mack resides at 8 Sound View Lane, Kings Point, New York and has his principal place of business at 370 W. Passaic Street, Rochelle Park, New Jersey.

10. Upon information and belief, Berger, at the time of the subject transactions, resided at 7 Meadow Road, Old Westbury, New York; Berger owned 100% of the stock of defendant Apex, a New

York Corporation, and had his principal place of business at Apex, located at 2001 Marcus Avenue, Suite 215N, Lake Success, New York.

11. Rosenstock and Genser looted Briggs and appropriated to themselves and their businesses and properties, the value of Briggs' major asset, its real estate at 777 Northern Blvd. in Great Neck (hereinafter "777 Northern Blvd.") by a scheme whereby Rosenstock and Genser caused Briggs to execute notes and mortgages on 777 Northern Blvd. in order to divert a substantial part or all of the proceeds from such loans to Rosenstock personally or businesses and properties owned by him individually or with others, including without limitation, Genser. Plaintiffs in the Grace #1 litigation were not allowed to amend their complaint and make Bank Leumi, Mack, Berger and Apex parties in that litigation and were not allowed to assert the claims in this action against them, *Grace v. Rosenstock*, 228 F.3d 40, 56 (2d Cir. 2000), *cert. den.* 532 U.S. 923 (2001), holding that "generally the **denial of leave to bring in new defendants does not have preclusive effect with respect to the claims against those defendants,** *see Northern Assurance Co. of America v. Square D Co.*, 201 F.3d 84 (2d Cir. 2000)."

12. Pursuant to Rosenstock and Genser's Plan, Briggs executed the following notes, guarantees and gave mortgages on 777 Northern Blvd. to **Bank Leumi**:

(a) on November 22, 1986 in the amount of $270,000, of which the sum of $201,683.33 went for Robert Rosenstock personally by Bank Leumi issuing a check for that amount to Berger for Robert Rosenstock's purchase of Mr. Berger's 50% interest in 124 S. Middle Neck Road Associates to bring Robert Rosenstock's ownership to 100% and by Bank Leumi issuing a check to the New York State Tax Commission in the amount of $68,316.67 in connection with Mr. Rosenstock's non-Briggs property, 124 S. Middle Neck Road;

(b) on April 22, 1988, in the total amount of $6.1 million. Consideration of approximately $1.9 million out of the total loan proceeds of $6.1 million went to Briggs. The balance of the loan proceeds went to Rosenstock personally or businesses and properties owned by him individually or with others, including without limitation, Genser. Some examples are: (i) Bank Leumi issued a check for $743,175 to Berger to pay off Robert Rosenstock's personal note plus interest to Mr. Berger; (ii) $398,451.86 went to Belgrave Oldsmobile, Inc. a company owned by Rosenstock and Genser; (iii) a check for $306,185.53 was issued by Bank Leumi to Lane Holding Co. to pay off a mortgage on 732 Northern Blvd. in Great Neck that was

an obligation of RER Motors, Inc., Rosenstock and Genser's company; (iv) $270,000 was used to pay Bank Leumi for its loan to Briggs on November 22, 1986 where the proceeds were used for Robert Rosenstock's personal benefit as set forth in subparagraph (a) above; and (v) Rosenstock and Genser charged Briggs for the entire cost of the loan - $150,000, when Briggs should have paid only $45,000 as its share of the cost of the total loan. Briggs also used a significant part of the $450,000 transferred to it to pay interest and principal on loans to or for the personal benefit of Rosenstock and Genser; and

(c) on October 6, 1988 in the total amount of $1,000,000, which in its entirety, went to Briggs Ford, an agency that was owned by Robert Rosenstock, his mother Charlotte Rosenstock, his sister Adrianne Rosenstock Halperin, and his brother-in-law James Halperin.

Bank Leumi had notice or knowledge of the Grace #1 litigation and knowledge that the loan proceeds from Bank Leumi under notes executed by Briggs did not go just to Briggs but went to Robert Rosenstock personally or to businesses and properties owned by Robert Rosenstock and others, including without limitation, Genser as above set forth. The notes, mortgages, guarantees and other

conveyances by Briggs to Bank Leumi were fraudulent as also above set forth and thus void.

13. Rosenstock and Genser caused Briggs to convey second, third, fourth and fifth mortgages on its real estate at 777 Northern Boulevard and caused Briggs to execute notes to Mack, Berger and Apex, where almost all of the proceeds from such loans went to Rosenstock personally or businesses and properties owned by him individually or with others, including without limitation, Genser:

(a) on February 10, 1989, the amount of the mortgage and note was $1 million to Mack where $900,000 of the proceeds went directly to GMAC, on behalf of Belgrave Oldsmobile, Inc., which was personally owned by Rosenstock and Genser; other parts of the remaining $100,000 was used for Rosenstock and Genser's personal benefit;

(b) on April 26, 1989, the amount of the mortgage and note was $1 million to Berger, of which $981,524 went into Robert Rosenstock's personal bank account at National Westminster Bank;

(c) on June 27, 1989, the total amount of the mortgages and notes was $1 million of which $500,000 was given to Apex and another $500,000 was given to Mack; $807,000 of the $1 million loan proceeds went into Robert Rosenstock's

personal bank account at National Westminster Bank and $175,000 was used to pay off a second mortgage and note on 51 Great Neck Road which was owned by 51 Great Neck Road Associates, Rosenstock and Genser's personal partnership; and

(d) on August 18, 1989, the total amount of the mortgages and notes was $500,000 of which $250,000 was given to Apex and another $250,000 was given to Mack; $493,500 of the loan proceeds went into Robert Rosenstock's personal bank account at National Westminster Bank.

14. Rosenstock and Genser caused Briggs to pay interest on the above mortgages and notes, which were almost entirely for the personal benefit of Rosenstock and Genser.

15. Despite knowledge by Mack, Berger and Apex that almost all of the proceeds of the loans made to Briggs as set forth in paragraph 13 either went into Robert Rosenstock's personal bank account or for the benefit of businesses or properties owned by Rosenstock and Genser, defendants Mack, Berger and Apex accepted notes and mortgages from Briggs as security when it knew Briggs only received a tiny fraction of the $3.5 million consideration they paid.

16. In 1986, 1988 and 1989, Rosenstock and Genser caused Briggs to issue mortgages and notes in the amount of $10.6 million to Bank Leumi, Mack, Berger and Apex. Out of the $10.6

million in cash generated from the mortgages less than $2 million went into Briggs and the balance was used for Robert Rosenstock's personal benefit and his joint ventures with Genser. Thus, the mortgages and notes were issued without fair consideration and were transfers in fraud of the plaintiffs stockholder class and made Briggs insolvent under New York's Debtor-Creditor law. Out of the $10.6 million in mortgages and notes issued by Briggs, it only recorded $3.7 million on its books.

17. On January 16, 1990 Rosenstock and Genser caused Briggs to sell its entire interest in its real estate at 777 Northern Blvd. to a third party for $4.65 million. On that same day as part of that transaction, Rosenstock and Genser caused Briggs to make payments of $4.1 million of the proceeds on the fraudulent mortgages: $3.1 million was paid to Bank Leumi, $500,000 was paid to Mack and $500,000 was paid to Apex; all such payments by Briggs were without fair consideration or without any consideration whatsoever. As a result, Briggs was left an empty shell.

18. The case against Robert Rosenstock and Briggs in the Grace #1 litigation was assigned to visiting Judge Charles R. Wolle with trial scheduled for August 11, 1997. It was settled on July 31, 1997. On August 4, 1997, Judge Trager entered a Final Order and Judgment against Robert Rosenstock and Briggs in the amounts of $6,912,288 and $4,028,000, respectively. Judgment

for the same amounts was entered by the Clerk on August 15, 1997 (Exhibit A).

19. Subsequently, the claims against Robert Genser in the Grace #1 litigation were dismissed after trial. That judgment was affirmed on appeal, *Grace v. Rosenstock*, 228 F.3d 40. On that same appeal, the defendants here – Bank Leumi, Mack, Berger and Apex – unsuccessfully attacked said August 15, 1997 judgment. A petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was denied in 2001.

**COUNT I.**

20. By virtue of the foregoing, Briggs issued notes, paid money for interest and principal on notes, and made conveyances of its real estate (through mortgages on its property at 777 Northern Blvd.) without fair consideration during the Grace #1 litigation which were fraudulent as to Briggs and plaintiffs under New York's Debtor-Creditor Law (hereinafter "DCL"), §273-a. Bank Leumi, Mack, Berger and Apex owe Briggs an amount in excess of $5,286,272. The conveyances or mortgages, issuance of notes, payment of money for interest and principal by Briggs set forth in paragraphs 12, 13 and 17 were accordingly transfers in fraud of Briggs and plaintiffs and were void.

21. Inasmuch as plaintiffs in this action were the plaintiffs stockholder class during the Grace #1 litigation when the fraudulent transfers

enumerated in paragraphs 12, 13 and 17 were made and plaintiffs have been unable to collect any money on its $4,028,000 judgment against Briggs, then plaintiffs here have the right to sue defendants on their $4,028,000 judgment against Briggs and collect $5,286,272 (including post judgment interest compounded annually) directly from defendants Bank Leumi, Mack, Berger and Apex under DCL § 273-a based on Briggs fraudulent transfers of money, mortgages and notes to said defendants without fair consideration.

**COUNT II.**

22. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 21 as if fully set forth herein.

23. By accepting first mortgages, guarantees and obligations under notes from Briggs in the amount of $7,100,000 on April 22, 1988 and on October 6, 1988 in exchange for less than $1,907,000 paid to Briggs as loan proceeds, Bank Leumi damaged Briggs and knew Briggs (i) would not be able to meet its debts as they matured; (ii) would not have sufficient capital to continue to operate its business; (iii) would be forced to borrow money almost immediately thereafter; (iv) would be placed in such perilous financial straits that it would be forced to sell its 777 Northern Blvd. property under duress; and (v) paid unearned interest and principal on the face amount of its debt to Bank

Leumi. Bank Leumi damaged Briggs by the amount of the fraudulent transfers, plus unearned interest and principal paid by Briggs to Bank Leumi. In addition, the payment by Briggs to Bank Leumi of $3,130,841 on January 16, 1990 was a fraudulent transfer since it was without fair consideration to Briggs. Therefore all of the above transfers by Briggs to Bank Leumi were made without fair consideration and were in violation of DCL § 273-a and should be set aside as void.

24. By reason of the foregoing, the 1992 judgment obtained by Bank Leumi against Briggs in the Supreme Court of the State of New York, County of Nassau, should be set aside since it was also based on said fraudulent transfers in violation of DCL §273-a.

WHEREFORE, plaintiffs pray for an order and judgment:

a. That defendant Bank Leumi pay $5,286,272 in damages to plaintiffs;

b. That defendant Mack pay $2,269,583 in damages to plaintiffs;

c. That defendant Berger pay $1,000,000 in damages to plaintiffs; and

d. That defendant Apex pay $1,252,803 in damages to plaintiffs;

e. That the fraudulent transfers to defendants Bank Leumi, Mack, Berger and Apex be set aside as void;

f. That this Court as a matter of equity set aside the 1992 judgment entered by the Supreme

Court of the State of New York, County of Nassau in favor of Bank Leumi and, *inter alia*, against Briggs inasmuch as it was based on fraudulent conveyances and Rosenstock and Genser wrongfully caused Briggs not to defend that action.

g. That the Court grant such other, further, and different relief as may be just, including damages, together with costs, disbursements, interest and a reasonable fee for plaintiffs' attorneys.

Dated October 28, 2002

LEVENTRITT LEWITTES & BENDER

By:_____(5341)
A Member of the Firm
Attorneys for the Plaintiffs Class
19 West 44 Street, Suite 711
New York, NY 10036-6070
(646) 562-0034

APPENDIX I

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

LORRAINE GRACE, et al.,

Plaintiffs,

- against -

ROBERT ROSENSTOCK, et al.,

Defendants.

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

Case Number: 85-CV- 2039

I, Robert C. Heineman, Clerk of the United States District Court certify that the attached judgment is a true and correct copy of the original judgment entered in this action on AUGUST 15, 1997, as it appears in the records of this court, and that no notice of appeal from this judgment has been filed, and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate Procedure has been filed.

**IN TESTIMONY WHEREOF, I sign my name and affix the seal of this Court.**

| | |
|---|---|
| JANUARY 8, 2002 | ROBERT C. HEINEMANN |
| *Date* | *Clerk* |
| | _____ |
| | *(By) Deputy Clerk* |

EXHIBIT A

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, et al.,

Plaintiffs,

- against -

ROBERT ROSENTSTOCK, et al.,

Defendants.

----------x

**JUDGMENT**
**85-CV-2039 (DGT)**

An order of the Honorable David G. Trager, United States District Judge, having been filed on August 5, 1997, no just reason for delay entering judgment in favor of plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,228.00; entering judgment in favor of plaintiffs class against defendant Briggs Leasing Corporation in the amount of $4,028,000.00; continuing this action by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in

bankruptcy on or before September 29, 1997; directing that the action in Supreme Court of the State of New York, County of New York, Index No. 96/600193, is moot only as to defendant Robert Rosenstock; and, directing that the action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot, it is

ORDERED and ADJUDGED that final judgment is hereby entered in favor of the plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,288.00; that final judgment is hereby entered in favor of the plaintiffs class against defendant Briggs Leasing Corporation in the amount of $4,028,000.00; that this action shall continue by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in bankruptcy on or before September 29, 1997; that the action in Supreme Court of the State of New York, County of New York, Index No. 96/600193 is moot only as to defendant Robert Rosenstock; and, that the action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of

petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot.

Dated: Brooklyn, New York
August 12, 1997

ROBERT C. HEINEMANN
Clerk of Court

By: _____
James Giokas
Chief Deputy Clerk

Filed in Clerk's Office
U.S. District Court E.D.N.Y.
August 15, 1997

A True copy Attest
Dated January 02, 2002
Robert C. Heinemann
Clerk

By _____
Deputy Clerk

**LEVENTRITT LEWITTES & BENDER**

March 17, 2004

Hon. David G. Trager, U.S.D.J.

Re: Grace, et al. v. Rosenstock, et al., 85 CV-2039 (DGT)

Dear Judge Trager::

Plaintiffs request leave of this Honorable Court to file this short letter in this major litigation to cite a case I overlooked yesterday at oral argument.

The Supreme Court of the United States in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) held:

> A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Even though a Rule 60(b) motion falls within the Court's sound discretion, such a motion or an independent action is restricted to relieving a **"party"** from a "judgment, order or proceeding". Therefore, here, to grant the **non-party** movants' motion to vacate the judgment against Briggs, *inter alia,* would be an error of law and accordingly an abuse of discretion.

Respectfully,

/s/
Sidney Bender

cc: Attorneys

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

LORRAINE GRACE, et al., Plaintiffs,

-against-

ROBERT ROSENSTOCK, et al., Defendants.

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**Civil Action No: 85-CV-2039 (DGT)**
**NOTICE OF MOTION**
**TO VACATE JUDGMENT**

**PLEASE TAKE NOTICE**, that upon the annexed Affidavit of Robert Fryd, Esq., sworn to March 19, 2003, together with the exhibits annexed thereto, and upon the accompanying memorandum of law, non-party Bank Leumi USA will move this Court before the Honorable David G. Trager, United States District Judge . . . for an Order:

(A) pursuant to Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure, vacating the money judgment, in the sum of $4,028,000 entered herein by this Court on August 15, 1997 against Briggs Leasing Corp.; and

(B) granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 25, 2003

WARSHAW BURSTEIN COHEN
SCHLESINGER & KUH, LLP
Attorneys for Non-Party Movant
Bank Leumi USA

TO: Attorneys

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

LORRAINE GRACE, et al., Plaintiffs,

-against-

ROBERT ROSENSTOCK, et al., Defendants.

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**Civil Action No: 85-CV-2039 (DGT)**

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE**, that the annexed Affidavit of Harvey Schwartz, Esq., the exhibits annexed thereto, the accompanying Memorandum of Law, and all of the exhibits annexed thereto and the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the United States District Court for the Eastern District of New York . . . for an Order pursuant to Federal Rule of Civil Procedure 60(b)(4) and (6) on behalf of non-parties DAVID MACK, ESTATE OF LEO V. BERGER and XEPA MARINE CORP. vacating the judgment entered by this Court on August 29, 1997, and any other relief as this Court deems just and proper;

Dated: New York, New York
March 25, 2003

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

LORRAINE GRACE, et al., Plaintiffs,

-against-

ROBERT ROSENSTOCK, et al., Defendants.

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**Civil Action No: 85-CV-2039 (DGT)**

**WHEREFORE**, plaintiffs request judgment be entered in their favor and against defendants Briggs Leasing Corporation and Briggs Acquisition Corporation on the issue of liability, and that plaintiffs have such further discovery as is necessary, and that an inquest be held for the purposes of determining the amount of damages to be included in the default judgment.

/s/
Sidney Bender

DEFAULT JUDGMENT FOR PLAINTIFFS
SO ORDERED

/s/
Sterling Johnson, Jr.
U.S.D.J.

DATED: November 30, 1993
Brooklyn, New York

**United States Court of Appeals,**
**Second Circuit.**

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(Argued: Nov. 19, 1999 Decided: Aug. 25, 2000)
Docket No. 98-9618.

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Lorraine GRACE, Individually and as Executrix of the Estate of Oliver R.Grace, Gerald I. White, As Executor of the Estate of Morgan H. Grace, and Gerald I. White, Trustee of the John E. Grace Trust, individually, and as stockholders of Briggs Leasing Corporation, suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

*Plaintiffs-Appellants,*

—v.—

Robert ROSENSTOCK, Edward Rosenstock, Briggs Leasing Corporation and Briggs Acquisition Corporation,

*Defendants,*

Robert GENSER,

*Defendant-Appellee,*

Bank Leumi Trust Company Of New York, David Mack, Leo V. Berger, Apex Marine Corporation and Gary Holman,

*Proposed Defendants-Appellees.*

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Before:

KEARSE, PARKER, and POOLER,
*Circuit Judges.*

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Appeal from a judgment of the United States District Court for the Eastern District of New York, Robert M. Levy, *Magistrate Judge*, dismissing claims against defendant-appellee under Securities Exchange Act of 1934 and state law in connection with freeze-out merger, *see* 23 F.Supp. 2d 326 (1998), and denying leave to file a supplemental complaint against persons not previously named as defendants.

Affirmed.

Sidney Bender, New York, New York (Risa Bender, Leventritt Lewittes & Bender, New York, New York, on the brief), for Plaintiffs- Appellants.

Herbert Rubin, New York, New York (David B. Hamm, Miriam Skolnik, Herzfeld & Rubin, New

York, New York, on the brief), for Defendant-Appellee.

Robert Fryd, New York, New York (Donald M. Levinsohn, Warshaw Burstein Cohen Schlesinger & Kuh, New York, New York, on the brief), for Proposed Defendant-Appellee Bank Leumi Trust Company.

Andrew J. Entwistle, New York, New York (William S. Gyves, Entwistle & Cappucci, New York, New York, on the brief), for Proposed Defendants-Appellees Berger, Mack, and Apex Marine Corporation.

David K. Bergman, New York, New York (Fred M. Weiler, Siller Wilk, New York, New York, on the brief), for Proposed Defendant-Appellee Holman.

KEARSE, Circuit Judge:
Plaintiffs Lorraine Grace et al., individually and representing former stockholders of defendant Briggs Leasing Corporation ("Briggs"), appeal from a judgment of the United States District Court for the Eastern District of New York, Robert M. Levy, Magistrate Judge, dismissing their amended complaint against defendant Robert Genser for alleged violations of §10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §78j(b) (1994), Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission

("SEC" or "Commission"), 17 C.F.R. §240.10b-5 (1999), and New York law, in connection with the 1985 freeze-out merger of Briggs and defendant Briggs Acquisition Corp. ("BAC"). The district court, following a bench trial, dismissed the §10(b) and Rule 10b-5 claims on the ground that plaintiffs had failed as a matter of law to prove causation; the court dismissed plaintiffs' state-law claims on the ground that appraisal under N.Y. Bus. Corp. L. §623 (McKinney 1986) was their exclusive remedy. *See* 23 F.Supp.2d 326 (1998). On appeal, plaintiffs contend principally that they were not required to prove causation, and that if required to do so they met their burden. Plaintiffs also challenge an interlocutory order denying their motion for leave to file a second-amended and supplemental complaint asserting new state-law claims against Genser and several proposed new defendants. For the reasons that follow, we affirm.

## I. BACKGROUND

Prior to 1985, Briggs was a publicly-held auto-leasing company incorporated in New York. Defendants Robert Rosenstock ("Rosenstock"), his father Edward Rosenstock, and Genser were officers and directors of Briggs and owned, respectively, approximately 64%, 3%, and 5% of its outstanding stock.

Plaintiffs Lorraine Grace and Gerald I. White, individually or as trustees or executors, are or represent former stockholders of Briggs who owned a total of 7,476 shares of Briggs, or approximately 1.25% of its outstanding stock.

In early 1985, Rosenstock and Genser decided to take Briggs private in a freeze-out merger. Accordingly, they incorporated BAC, planning to merge BAC and Briggs, buy out Briggs's minority shareholders, and make Briggs the surviving corporation. Rosenstock and Genser contributed all of their Briggs shares to BAC; Rosenstock also purchased his father's shares and contributed those to BAC. As a result, BAC owned 72% of the stock of Briggs, with Rosenstock and Genser owning all of the stock of BAC. Under New York's Business Corporation Law ("BCL"), a merger may be authorized by the affirmative vote of two-thirds of the corporation's shares. *See* N.Y. Bus. Corp. L. §903(a)(2) (McKinney Supp.1999).

In January 1985, Briggs sent its shareholders notice of, and a proxy statement for, a special meeting to vote on the proposed merger. The notice informed shareholders, *inter alia*, that (a) because BAC owned 72% of Briggs's shares and would vote those shares in favor of the merger, approval was assured irrespective of the votes of Briggs's other shareholders; (b) all minority shareholders would be forced to sell their shares to the surviving

corporation for $1.50 per share; (c) after the merger, the BAC shares would be converted to shares of Briggs; and (d) Rosenstock and Genser, who owned all of the shares of BAC, would thus become the sole shareholders of Briggs. The proxy statement ("Briggs proxy statement" or "proxy statement") also stated that dissenting shareholders would have the right under New York law to obtain an appraisal of, and payment for, the fair value of their shares.

At the meeting, plaintiffs voted their shares against the merger, which was approved based on BAC's vote. The merger was consummated on February 26, 1985, and Rosenstock and Genser became the sole holders of Briggs shares, owning approximately 93% and 7%, respectively.

A. *The Present Action: The First Twelve Years*

Plaintiffs commenced the present action in June 1985 as an individual, derivative, and class action, requesting equitable and monetary relief against Briggs, BAC, Rosenstock, Edward Rosenstock, and Genser; the amended complaint was filed a month later. Contemporaneously, plaintiffs sued in New York state court, asserting appraisal rights under BCL §623; proceedings in that suit were stayed pending disposition of this action.

The amended complaint in the present action alleged principally that the Briggs proxy statement was false and misleading by reason of numerous material omissions and untrue statements, including vast understatements of the compensation paid by Briggs to Rosenstock, Edward Rosenstock, and Genser; false representations that the reason for the merger was to relieve Rosenstock and Genser of their roles as personal guarantors of Briggs's debt, when in fact the primary guarantor of such debt until January 1985 was Charlotte Rosenstock (Rosenstock's mother) and the entrance of Rosenstock and Genser as guarantors was spuriously devised to provide a facially valid reason for the merger; and the false valuation of Briggs's real estate at $883,503, when in fact its value exceeded $2 million.

The amended complaint also alleged that the Briggs proxy statement failed to disclose, *inter alia*, that Rosenstock and Genser pursued the merger as part of a scheme to divert the assets of Briggs to themselves; that they had plans to develop certain of Briggs's real estate into an office-building-supermarket complex for their own benefit; that a third party had offered in excess of $1.5 million for Briggs's real estate; that in January 1985 a third party had offered $3.00 per share for Briggs stock; and that Briggs assets had been diverted to defendants' personal use to fund the individual defendants' opulent lifestyles.

The amended complaint asserted that defendants' conduct violated §10(b) and Rule 10b-5, as well as various provisions of New York common law and statutory law dealing principally with securities fraud and shareholders meetings. Invoking BCL §623(k), which provides that generally an appraisal proceeding constitutes a dissenting shareholder's exclusive remedy but makes an exception where the corporate action at issue was unlawful or fraudulent as to that shareholder, the amended complaint requested rescission or reformation of the merger and an accounting for the injuries inflicted on Briggs. The action was certified as a class action in August 1986 by Mark A. Costantino, *District Judge*. According to the district court docket entries, the action then lay inactive for some seven years.

In 1993, pursuant to Fed.R.Civ.P. 55, defaults were entered against Briggs and BAC, neither corporation being represented by counsel. In 1994, the court, Sterling Johnson, Jr., *District Judge*, entered a default judgment against those defendants on the issue of liability and ordered an inquest on damages. Also in 1994, the death of Edward Rosenstock was noted on the record. No executor or administrator was substituted for him, and the claims against him were abandoned.

In August 1997, pursuant to a stipulation among plaintiffs, Rosenstock, and Briggs (into which BAC

had been merged), the claims against Briggs and Rosenstock were resolved in a partial final judgment ("1997 Judgment"), David G. Trager, *District Judge*. The 1997 Judgment awarded the plaintiff class approximately $4 million against Briggs and approximately $6.9 million against Rosenstock. Pursuant to the stipulation, the 1997 Judgment also declared moot plaintiffs' state-court appraisal action.

In the meantime, in 1996, as discussed in Part II.C. below, plaintiffs had sought leave to file a second-amended and supplemental complaint, alleging new state-law claims against Rosenstock, Genser, and several new proposed defendants. That motion was denied.

B. *The October 1998 Dismissal of the Remaining Claims*

The above proceedings left pending only plaintiffs' claims against Genser. After entry of the 1997 Judgment, plaintiffs and Genser consented to have all further proceedings, including entry of judgment, conducted by a magistrate judge, and the matter was referred to Magistrate Judge Levy. Following a bench trial, the court, in a Memorandum and Order dated October 29, 1998 ("October 1998 Order"), and reported at 23 F.Supp.2d 326, dismissed the claims against Genser in their entirety.

With respect to the 1934 Act claims, the court noted that in order to succeed on a claim under §10(b) and Rule 10b-5, a plaintiff must prove a misrepresentation or omission as to a material fact in connection with the purchase or sale of a security, and an injury to the plaintiff caused by his reliance on the misrepresentation or omission. The district court assumed, *arguendo*, that plaintiffs could prove one or more material misrepresentations or omissions in the Briggs proxy statement regarding the merger that led to the forced sale of their Briggs shares. However, it concluded that, under the principle established by *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991), which involved claims that misrepresentations in proxy materials violated §14(a) of the 1934 Act, 15 U.S.C. §78n(a) (1994), plaintiffs had not established the causation element because their votes were not needed for approval of the Briggs-BAC merger.

The district court acknowledged that minority shareholders whose votes were unnecessary for approval of a freeze-out merger might nonetheless establish causation by showing that omissions or misrepresentations in the proxy statement had induced them to vote in favor of the merger and thereby caused them to forfeit an otherwise-available state-law remedy. *See* Virginia Bankshares, 501 U.S. at 1107, 111 S.Ct. 2749 (leaving open the possibility of that theory of

causation); *Wilson v. Great American Industries, Inc.*, 979 F.2d 924, 931 (2d Cir.1992) (upholding liability rulings in favor of shareholders on that theory of causation). In the present case, however, the district court concluded that causation on that theory had not been established because plaintiffs had the right to an appraisal of the fair value of their shares, and they did not show that they had forfeited that or any other state-law remedy as a result of the alleged fraud in the Briggs proxy statement. The court noted that, except in circumstances inapplicable here, New York law makes appraisal a dissenting shareholder's exclusive remedy:

> [t]he enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership.

N.Y. Bus. Corp. L. §623(k). Thus, the court rejected an argument by plaintiffs that but for the misleading nature of the proxy statement they could have obtained an injunction against the merger.

Given the exclusivity of plaintiffs' appraisal remedy, the district court also concluded that plaintiffs had no right to recover damages from Genser on their claims under state law. Although §623(k) goes on to state that "this section shall not

exclude the right of such shareholder to bring or maintain an *appropriate* action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him," id. (emphasis added), the court concluded that the exception was inapplicable because plaintiffs' remaining claims against Genser sought only monetary relief:

> The "appropriate" action referred to in subdivision (k) has been held to be "one in which a dissenting shareholder seeks some form of equitable relief." *Breed [v. Barton*, 54 N.Y.2d 82, 87, 444 N.Y.S.2d 609, 429 N.E.2d 128, 130 (1981) ]; *see also Burke v. Jacoby*, 981 F.2d 1372, 1380 (2d Cir.1992) ("An 'appropriate action' within the meaning of §623(k) is an action seeking equitable relief, and that type of action and the exercise of the right of appraisal are the dissatisfied stockholder's only avenues of relief."). As the New York Court of Appeals explained in *Breed*, limiting the exception in subdivision (k) to equitable relief "serves the valid function of denying dissenting shareholders the ability to reopen prior appraisal proceedings and again seek the identical relief merely by alleging fraudulent or unlawful corporate conduct in relation to the merger." *Breed*, [54 N.Y.2d at 87,] 444 N.Y.S.2d 609, 429 N.E.2d at 130. Although plaintiffs alleging fraud in an equitable proceeding under subdivision (k) may also seek money damages,

> the equitable relief must be the primary request, and such damages must be incidental to a grant of equitable relief. *Id.* [at 87, 444 N.Y.S.2d 609, 429 N.E.2d] at 131; see also Burke, 981 F.2d at 1380 ("Money damages are not available except as ancillary to a grant of traditionally equitable relief.") ...; *Direct Media/DMI, Inc. v. Rubin*, 171 Misc.2d 505, 654 N.Y.S.2d 986, 989 (1997) ("[A] shareholder may not seek an appraisal and also commence a separate action to recover money damages for improper corporate action....").

Grace v. Rosenstock, 23 F.Supp.2d at 335-36. The court noted that although plaintiffs originally had requested principally equitable relief against all defendants, their claims against Briggs had been settled and their only remaining requests against Genser were for money damages:

> Nothing in plaintiffs' pre-trial or post-trial submissions indicates a desire on plaintiffs' part for the court to award equitable relief, other than "rescissory damages," i.e., money damages, against Genser.... Plaintiffs' counsel made no mention of any other remedies at trial, and in fact conceded that plaintiffs' claim against Genser is for monetary damages. *See* Tr. at 687 ("What we are concerned here with is a claim of breach of fiduciary duty, ... which is an action

> not for fair price alone, it's an action for damages....").
> *Id.* at 336 n. 8.

Accordingly, all of plaintiffs' claims against Genser were dismissed. This appeal followed.

## II. DISCUSSION

On appeal, plaintiffs challenge the October 1998 Order dismissing their claims against Genser, contending principally that because the proxy statement was issued in support of a freeze-out merger, resulting in a forced sale, they should not have been required to show causation in order to recover under §10(b) or Rule 10b-5; they also contend that if required to prove causation, they met their burden. In addition, plaintiffs challenge the district court's rejection of their 1996 motion for leave to file a new complaint adding new state-law claims and new parties to the action. For the reasons that follow, we find no basis for reversal.

### A. *The Dismissal of the Federal Claims Against Genser*

In challenging the dismissal of their federal claims against Genser, plaintiffs contend principally that Virginia Bankshares does not apply to actions brought under §10(b) and Rule 10b-5, and that even if Virginia Bankshares applies, they established

causation because they forfeited a state- law remedy in reliance on misrepresentations in and omissions from the proxy statement. We find no merit in these contentions.

1. The Causation Requirement

Section 10(b) of the 1934 Act, which is generally regarded as a catch- all provision with respect to securities-related fraud, *see, e.g., Chiarella v. United States*, 445 U.S. 222, 226, 234-35, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), prohibits the use, in connection with the purchase or sale of any security, of

> any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors,

15 U.S.C. §78j(b). Rule 10b-5, which impliedly provides a private right of action, *see, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), makes it unlawful, in connection with the purchase or sale of any security, to

> make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

> circumstances under which they were made, not misleading,

17 C.F.R. §240.10b-5(b). Because the private right of action under §10(b) and Rule 10b-5 is implied rather than express, its boundaries are left to judicial inference. *See*, e.g., *Blue Chip Stamps*, 421 U.S. at 749, 95 S.Ct. 1917 ("No language in either of those provisions speaks at all to the contours of a private cause of action for their violation.").

In framing the contours of private rights of action implied under the 1934 Act, the courts have sought to exclude, as a matter of law, claims based on hypothetical circumstances or speculation. Early in the development of such actions under §10(b) and Rule 10b-5, which addresses fraud "in connection with" the purchase or sale of a security, this Court ruled that no private action under those provisions is available to persons who were neither buyers nor sellers of the relevant securities. *See Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 462-64 (2d Cir.), *cert. denied*, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952). That principle was adopted by the Supreme Court in *Blue Chip Stamps*, in which the plaintiffs were persons who had been offered--but had declined to purchase--shares in *Blue Chip Stamps* Co. pursuant to an antitrust-related consent decree entered into between the United States and the company. *See* 421 U.S. at 725-26, 95 S.Ct. 1917. The plaintiffs contended that the company

had "intentionally made the prospectus overly pessimistic" in order to dissuade the plaintiffs from accepting the offer, and thereby allow the rejected shares to be sold to the public at a higher price. *Id.* at 726-27, 95 S.Ct. 1917. The Supreme Court ruled that the district court had properly dismissed the suit. The Court reasoned that expanding the class of persons entitled to bring suit under Rule 10b-5 to include those who had neither bought nor sold shares would vastly increase the amount of frivolous securities litigation before the federal courts, in part because "the abolition of the *Birnbaum* rule would throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony." 421 U.S. at 743, 95 S.Ct. 1917.

Insofar as the element of causation is concerned, we have held in a variety of contexts that in order to establish a *prima facie* case under Rule 10b-5, a plaintiff must show, *inter alia*, both "*loss causation*--that the misrepresentations or omissions caused the economic harm," and "transaction causation--that the violations in question caused the [plaintiff] to engage in the transaction in question." Bennett v. United States Trust Co. of New York, 770 F.2d 308, 313 (2d Cir.1985) (internal quotation marks omitted) (emphases in original) (alleged misrepresentation as to margin rules), *cert. denied*, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986); *see also Burke v. Jacoby*, 981 F.2d 1372,

1378 (2d Cir.1992) (alleged misrepresentation in connection with corporate acquisition), *cert. denied*, 508 U.S. 909, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993); Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1494 (2d Cir.1992) (alleged misrepresentation in application for financing). We have also noted that both *loss causation* and transaction causation must be proven in the context of a private action under §14(a) of the 1934 Act and SEC Rule 14a-9 promulgated thereunder. *See Wilson v. Great American Industries, Inc.*, 979 F.2d 924, 931 (2d Cir.1992) ( " Wilson "); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381-82 (2d Cir.1974), *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975), overruled on other grounds by Virginia Bankshares, 501 U.S. at 1100 n. 9, 1100-06.

As to the question presented here, i.e., whether transaction causation must be proven in connection with a securities-fraud claim based solely on misleading proxy statements and brought under §10(b) and Rule 10b-5, we find guidance in the decision of the Supreme Court in Virginia Bankshares with respect to claims of misleading proxy statements brought under §14(a) and Rule 14a-9, given that the interest in closing the floodgates to claims that are speculative or hypothetical is the same under both sets of provisions.

Section 14(a) makes it unlawful, by the use of the mails or any other instrumentality of interstate commerce, to solicit proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors...." 15 U.S.C. §78n(a). Rule 14a-9, promulgated thereunder, provides that

> [n]o solicitation subject to this regulation shall be made by means of any proxy statement ... containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading....

17 C.F.R. §240.14a-9(a) (1999). Section 14(a) and Rule 14a-9, like §10(b) and Rule 10b-5, do not expressly provide a private right of action. The Supreme Court recognized an implied private right of action for injury caused by a violation of §14(a), as implemented by Rule 14a-9, in J.I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), the Court ruled that the causation requirement of Rule 14a- 9 would be satisfied where the challenged proxy statement

"was an essential link in the accomplishment of the transaction." *Id.* at 385, 90 S.Ct. 616. In that case, the majority shareholder held just over one-half of the corporation's outstanding shares, but the proposed merger could not be approved without the affirmative vote of two-thirds. Thus, the minority-shareholder plaintiffs were held to have satisfied the causation element because the merger could not have been authorized without the affirmative vote of at least some of the minority shares. The Mills Court left open the question of "whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority." *Id.* at 385 n. 7.

The Supreme Court answered that question in Virginia Bankshares, ruling that minority shareholders whose votes were not required for approval of the proposed freeze-out merger had failed to show that the materially misleading representations in the proxy statement violating Rule 14a-9 caused their injury. Although the plaintiff shareholders argued that the challenged proxy statement was an "essential link" within the meaning of Mills on the theory that their negative votes, though insufficient to defeat the merger, would have created sufficient bad publicity that the directors would not have proceeded with the merger, see 501 U.S. at 1100-01, 111 S.Ct. 2749,

the Virginia Bankshares Court found that theory too speculative:

> [I]n *Blue Chip Stamps* we raised concerns about the practical consequences of allowing recovery, under §10(b) of the Act and Rule 10b-5, on evidence of what a merely hypothetical buyer or seller might have done on a set of facts that never occurred, and foresaw that any such expanded liability would turn on "hazy" issues inviting self-serving testimony, strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process.... These were good reasons to deny recognition to such claims in the absence of any apparent contrary congressional intent.
>
> The same threats of speculative claims and procedural intractability are inherent in respondents' theory of causation linked through the directors' desire for a cosmetic vote. Causation would turn on inferences about what the corporate directors would have thought and done without the minority shareholder approval unneeded to authorize action. A subsequently dissatisfied minority shareholder would have virtual license to allege that managerial timidity would have doomed corporate action but for the ostensible approval induced by a misleading statement, and opposing claims of hypothetical diffidence and hypothetical boldness on the part

> of directors would probably provide enough depositions in the usual case to preclude any judicial resolution short of the credibility judgments that can only come after trial. Reliable evidence would seldom exist. Directors would understand the prudence of making a few statements about plans to proceed even without minority endorsement, and discovery would be a quest for recollections of oral conversations at odds with the official pronouncements, in hopes of finding support for ex post facto guesses about how much heat the directors would have stood in the absence of minority approval. The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory of causation that raised such prospects, and we reject this one.

Virginia Bankshares, 501 U.S. at 1105-06, 111 S.Ct. 2749.

Although Virginia Bankshares addressed proxy-statement-fraud claims brought only under §14(a) and Rule 14a-9, its express reliance on the rationale of *Blue Chip Stamps*, a case involving §10(b) and Rule 10b-5, demonstrates that the same concerns compel the conclusion that the scope of the implied private right of action under either set of provisions does not encompass claims based on "a merely hypothetical ... set of facts that never occurred,"

Virginia Bankshares, 501 U.S. at 1105, 111 S.Ct. 2749. Plaintiffs have advanced no logical rationale--and we see none--for allowing a claimant to prevail on a misleading-proxy-statement claim under §10(b) and Rule 10b-5 without proving causation, when causation is required with respect to such a claim under §14(a) and Rule 14a-9, which deal expressly with misleading proxy statements, and is required under §10(b) and Rule 10b-5, which deal with claims of misleading statements in any medium. We conclude that the principle announced in Virginia Bankshares is applicable to misleading-proxy-statement claims that are brought under §10(b) and Rule 10b- 5, and that in order to prevail on such a claim, a plaintiff must present nonspeculative evidence of *loss causation* and transaction causation, see Wilson, 979 F.2d at 931.

We reject plaintiffs' contention that "[w]here the misrepresentations and nondisclosures under Rule 10b-5 are part and parcel of the forced sale by the plaintiffs shareholders ..., there is no separate requirement to show causation" (Plaintiffs' brief on appeal at 43). For that proposition, plaintiffs rely on Vine v. Beneficial Finance Co., 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970, 88 S.Ct. 463, 19 L.Ed.2d 460 (1967). Quaere whether Vine would survive the rationale of Virginia Bankshares if Vine 's holding were as plaintiffs have characterized it; but in any event, in light of its actual holding, plaintiffs' *49 reliance is misplaced.

In Vine, we considered the complaint of a Class A shareholder who, after being subjected to a freeze-out merger, brought an action under §10(b) and Rule 10b-5 alleging that the defendant tender offeror had attained the share percentage needed to approve the freeze-out merger by fraudulently inducing Class A shareholders other than the plaintiff to tender their shares to it. We did not hold that the plaintiff was not required to plead reliance or causation; rather, we held that the complaint adequately pleaded both elements. Noting that the complaint alleged a single two-phase scheme to eliminate Class A shareholders, we stated that "[w]hat must be shown is that there was deception which misled Class A stockholders and that this was in fact the cause of plaintiff's claimed injury. The allegations of this complaint meet that test." *Id.* at 635.

In the present case, plaintiffs did not meet that test. Rosenstock and Genser at all pertinent times owned sufficient shares, either directly or through their ownership of BAC, to approve the Briggs-BAC merger, and there is no suggestion that they acquired those shares by means of fraud. No vote, sale of shares, or other action was required of minority shareholders in order to accomplish the merger.

In sum, Virginia Bankshares applies to claims of proxy fraud brought under §10(b) and Rule 10b-5,

and a plaintiff may not recover on such a claim without proving that his injury was caused by the fraud. Plaintiffs here, because minority-shareholder votes were not required for approval of the merger that was the subject of the proxy statements, did not show causation based on the approval of the merger.

2. Causation Based on Forfeiture of a State Remedy

The Virginia Bankshares Court left open the possibility that even minority shareholders whose votes were not necessary for approval of the proposed merger might nonetheless satisfy the causation requirement if they could show that the violations induced them to forfeit a state remedy. *See* 501 U.S. at 1107, 111 S.Ct. 2749. This Court addressed that issue in Wilson, in which the management had controlled sufficient shares to approve the proposed merger without the minority's votes, the plaintiff minority shareholders had been induced to vote in favor of the merger, and "their deceptively procured vote in favor of the merger deprived them of their state appraisal rights under" New York law, 979 F.2d at 930. We upheld the liability ruling in favor of the Wilson plaintiffs, stating as follows:

> We recognize that loss causation or economic harm to plaintiffs must be shown, as well as proof that the misrepresentations induced

> plaintiffs to engage in the subject transaction, that is, transaction causation. Here loss causation may be established when a proxy statement prompts a shareholder to accept an unfair exchange ratio for his shares rather than recoup a greater value through a state appraisal. And transaction causation may be shown when a proxy statement, because of material misrepresentations, causes a shareholder to forfeit his appraisal rights by voting in favor of the proposed corporate merger.

Wilson, 979 F.2d at 931.

> We noted that allowing that type of action does not pose a threat of "speculative claims and procedural intractability," ... because the forfeiture of state [remedies] is a question separate from the effectuation of the merger and does not require courts to guess how or whether the majority shareholders would have proceeded in the face of minority dissent.

*Id.* at 932 (quoting Virginia Bankshares, 501 U.S. at 1105.

In the present case, however, plaintiffs did not vote in favor of the merger and did not show that they relied on the proxy materials in any way that caused them to forfeit their rights to appraisal. Rather, plaintiffs contend, relying on Lynch v. Vickers

Energy Corp., 429 A.2d 497, 501 (Del.1981), overruled on other grounds, Weinberger v. UOP, Inc., 457 A.2d 701, 703-04 (Del.1983), that causation was established because they forfeited their state-law rights to obtain "rescissory damages" (Plaintiffs' brief on appeal at 51). We are unpersuaded for several reasons.

First, as the district court noted, see Part I.B. above, under New York law governing freeze-out mergers, except for an "appropriate" equitable action as envisioned by BCL §623(k), appraisal is the dissenting shareholders' exclusive remedy. Although the Lynch court held that a rescissory-damages remedy was available under Delaware law to the plaintiffs before it, the transaction at issue was not a freeze-out merger but a tender offer by the corporation's majority shareholder, and no appraisal remedy was available. We are not persuaded that Lynch, in which there was no forced sale and the tendering shareholders had no appraisal remedy, is authority for the proposition that rescissory damages were available under New York law in the present case where there was a forced sale, there was an appraisal remedy, and the pertinent statute provided that appraisal was the exclusive remedy. Plaintiffs cite no case applying New York law, and we know of none, that authorizes an award of rescissory damages for a freeze-out merger as to which a dissenting shareholder had a right of appraisal.

Second, though Lynch held that rescissory damages may be available as an equitable substitute for rescission where, because of mergers, the latter remedy is as a practical matter no longer feasible, plaintiffs have cited no authority suggesting that a monetary award in favor of a shareholder against a director would be viewed as anything other than an award of damages at law in circumstances where, as here, the plaintiffs have already settled their claims against the party that purchased their shares--i.e., the only entity against which rescission would be even a theoretically permissible remedy.

Third, we note that under Lynch, rescissory damages may reflect increases in the corporation's value subsequent to the challenged transaction and that plaintiffs in the present action apparently seek to benefit from a "surge in land values" through a date at least "30 months after the [Briggs] merger" (Plaintiffs brief on appeal at 51). Here, however, the pertinent defendants lawfully owned sufficient shares to approve the merger and freeze out other shareholders without the approval of any minority shares. Lynch did not involve such circumstances, and plaintiffs have not cited any New York case to support their suggestion that, in the circumstances here, an action for rescissory damages encompassing post-merger surges in land values would be considered an "appropriate" action within the meaning of §623(k).

Finally, we note that although plaintiffs no longer have appraisal rights, that is not the result of any reliance on the Briggs proxy statements. Rather, their appraisal suit was declared moot pursuant to their stipulation leading to the 1997 Judgment, which awarded the plaintiff class some $11 million from Briggs and Rosenstock. We see no forfeiture there.

In sum, plaintiffs have cited no New York law, or any other relevant authority, for the proposition that there was any available state-law remedy that they forfeited in reliance on the Briggs proxy statement. Accordingly, since their votes were not needed for approval of the merger, the district court correctly concluded that they failed to prove causation as required by §10(b) and Rule 10b-5.

B. *The Dismissal of the State-Law Claims*

Plaintiffs contend that the district court erred in finding their state-law claims against Genser barred by BCL §623(k) because it mistakenly believed that those claims sought primarily money damages rather than equitable relief. Plaintiffs argue that those claims must be viewed as requests for equitable relief because a February 1986 order of Judge Costantino effectively so characterized them. We disagree.

First, even if Judge Costantino's characterization of the claims constituted an order, it plainly was interlocutory. All interlocutory orders remain subject to modification or adjustment prior to the entry of a final judgment adjudicating the claims to which they pertain. *See* Fed.R.Civ.P. 54(b); Cullen v. Margiotta, 811 F.2d 698, 708 (2d Cir.), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987), overruled on other grounds, Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987); United States v. LoRusso, 695 F.2d 45, 53 (2d Cir.1982) ("whether the case sub judice be civil or criminal[,] so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so" (internal quotation marks omitted)), *cert. denied*, 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983).

Second, the posture of the case changed significantly in the 12 years between Judge Costantino's characterization of it in 1986 and the magistrate judge's analysis in 1998. Judge Costantino dealt only with the pleadings, and, aside from a typical catchall paragraph that mentioned damages, the only relief requested by the amended complaint was equitable. On the claims against Briggs, it requested rescission of the merger or reformation of its terms; on the derivative claim on

behalf of Briggs, it sought from the individual defendants an accounting and disgorgement of profits. By the time of trial in 1998, however, plaintiffs had settled their claims against Briggs, the purchaser of their shares; plaintiffs thus could no longer seek rescission. Nor were there any remaining derivative claims, as Briggs was no longer a party. Thus, as the district court observed in its October 1998 Order, plaintiffs' counsel stated at trial that " '[w]hat we are concerned here with is a claim of breach of fiduciary duty, ... which is an action not for fair price alone, it's an action for damages....' " 23 F.Supp.2d at 336 n. 8 (quoting Tr. 687). We note that, in the wake of that ruling, plaintiffs made no effort to suggest, by way of a motion for reconsideration by that court, that the court had misapprehended the nature of their remaining claims against Genser.

We see no error in the district court's characterization or dismissal of plaintiffs' state-law claims against Genser.

C. The Proposed Second Amended and Supplemental Complaint

In January 1996, more than a decade after commencing this action, plaintiffs sought leave to file a "Supplemental and Second Amended Complaint" ("Supplemental Complaint"), which would have added state-law claims against (a)

Rosenstock and Genser, (b) Bank Leumi Trust Company of New York ("Bank Leumi"), David Mack, Leo V. Berger, and Apex Marine Corp. (collectively the "proposed creditor defendants"), and (c) Gary Holman, an attorney for Briggs. Plaintiffs asserted, *inter alia*, that after consummation of the freeze-out merger, Rosenstock and Genser had engaged in a scheme to "subvert the jurisdiction of this federal Court ... [and] to make any judgment rendered by this Court in this action unenforceable and of no practical value" (Supplemental Complaint P 47) by causing Briggs to transfer assets to themselves and to the proposed creditor defendants.

The Supplemental Complaint alleged that Rosenstock and Genser, in furtherance of that scheme, looted Briggs between November 1986 and August 1989 by mortgaging its property to secure loans from the proposed creditor defendants and using the proceeds of the loans primarily for their own personal benefit rather than for the benefit of Briggs. Those acts were alleged to have violated common law and various provisions of New York's Debtor and Creditor Law ("DCL"), see N.Y. Debt. & Cred. L. (McKinney 1990), to wit, id. §273 (conveyance by a person who is insolvent); id. §273-a (conveyance by a person who is a defendant in a pending action or who has a judgment docketed against him); id. §274 (conveyance by a person in business); and id. §276 (conveyance made with

intent to defraud). The proposed pleading also alleged that in January 1990, Briggs and Rosenstock sold Briggs real estate for approximately 20% below its fair market value in order to make payments to the proposed creditor defendants.

The Supplemental Complaint further alleged that each of the proposed creditor defendants accepted notes and mortgages from Briggs, knowing that the proceeds of the loans were being diverted to Rosenstock and Genser for their personal use. Bank Leumi was alleged to have known that Briggs would not be able to meet its obligations, would be forced to borrow additional funds, and would be forced to sell its real estate under duress. The Supplemental Complaint alleged that Holman had committed professional malpractice and breached fiduciary and contractual duties to Briggs and to plaintiffs by representing Briggs while also serving as attorney to Rosenstock and Genser in their personal capacities, and by supervising the allegedly fraudulent conveyances while knowing that they were fraudulent as to Briggs and plaintiffs.

The Supplemental Complaint principally sought awards of damages to plaintiffs and Briggs, including punitive damages from Rosenstock and Genser. It also sought nullification of a 1992 state-court foreclosure judgment that Bank Leumi had obtained against Briggs.

The proposed new defendants opposed plaintiffs' motion to file the Supplemental Complaint, arguing principally that there was no basis for federal jurisdiction over the claims against them and that the claims were barred by the applicable statutes of limitations. Magistrate Judge Levy (to whom the matter had not yet been referred for all purposes) denied the motion, and plaintiffs' objections to that denial were rejected by Judge Trager. Without deciding the jurisdictional questions, the court denied the motion on the grounds of futility and delay, as explained in the magistrate judge's Memorandum and Order dated September 30, 1996 ("September 1996 Order"), reported at 169 F.R.D. 473 (1996).

In that decision, the court noted that the new claims that plaintiffs moved to add were subject to a six-year statute of limitations. Because plaintiffs' motion was made in 1996 and the new claims focused on conduct alleged to have occurred principally in 1986-1989, the court concluded that filing of the Supplemental Complaint would likely be futile because most of the new claims appeared to be time-barred. Plaintiffs argued that the statute of limitations was no bar because the filing of their new claims should be deemed to "relate [ ] back" to the time of filing of their amended complaint, Fed.R.Civ.P. 15(c). The court rejected that contention, observing that the proposed pleading was not based on the events challenged in the

amended complaint but rather "related to the notes and mortgages that Briggs executed years later"; hence the amended complaint could not have provided notice of the new claims. September 1996 Order, 169 F.R.D. at 481-82. The court likewise rejected plaintiffs' contention that relation back was appropriate on the theory that plaintiffs were challenging a "continuing course of conduct"; the court pointed out that the amended "complaint alleged, in essence, a specific act of wrongdoing, i.e., a freeze-out merger, which is a distinct transaction from the subsequent note and mortgage transactions plaintiffs now seek to add." *Id.* at 482 (internal quotation marks omitted).

Plaintiffs also argued that in 1990, less than six years prior to their January 1996 motion to file the Supplemental Complaint, Briggs made mortgage payments to the proposed creditor defendants, raising the cash for those payments by selling real estate below fair market value, and that the fraudulent-conveyance claims under DCL S§273, 274, and 276 based on those payments were not time-barred. The district court disagreed, reasoning that "[t]he January 1990 loan payments cannot, by themselves, constitute fraudulent conveyances, since they are not events that are independent or separate from the original note and mortgage transactions." September 1996 Order, 169 F.R.D. at 482. In addition, the court stated that even if that argument had merit, it would deny leave

to add those claims to the suit in order to avoid delaying resolution of this hoary action:

> Even if the January 1990 payments could themselves be considered fraudulent conveyances, ... this court would nonetheless deny plaintiffs' motion to amend and supplement the pleadings to include allegations regarding those payments. At this late date in the proceedings[,] granting plaintiffs' motion would cause substantial further delays and prejudice to the proposed new defendants, who would now be required to re-open all of the depositions that have taken place thus far in the litigation and to conduct full document discovery.

*Id.* at 482 n. 5.

The court also rejected several other timeliness arguments advanced by plaintiffs, including equitable tolling and equitable estoppel. Noting that "the doctrine of equitable tolling applies 'where the facts show that the defendant engaged in conduct, often itself fraudulent, that concealed from the plaintiff the existence of [the] cause of action,' " id. at 483 (quoting Long v. Frank, 22 F.3d 54, 58 (2d Cir.1994), *cert. denied*, 513 U.S. 1128, 115 S.Ct. 938, 130 L.Ed.2d 883 (1995)), the court pointed out that this case was then more than 11 years old and that plaintiffs did not dispute that they

had known of the alleged fraudulent conveyances at least as early as 1993. The court found that plaintiffs "offer[ed] no adequate explanation as to why they were unable to conduct full discovery ... prior to 1993." September 1996 Order, 169 F.R.D. at 484. In addition, noting that the doctrine of equitable estoppel is applied " 'in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay bringing his lawsuit,' " id. (quoting Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 61 (2d Cir.1986)), the court found that doctrine inapplicable because plaintiffs "d[id] not contend that any of the defendants or proposed defendants engaged in conduct that caused plaintiffs to delay bringing suit once they were fully aware of their claims," September 1996 Order, 169 F.R.D. at 484.

On this appeal, plaintiffs raise various challenges to the district court's denial of leave to file the Supplemental Complaint. In reviewing their challenges, we are mindful that leave to amend is to be granted "freely ... when justice so requires," Fed.R.Civ.P. 15(a); see also Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); John Hancock Mutual Life Insurance Co. v. Amerford International Corp., 22 F.3d 458, 462 (2d Cir.1994). However, in determining whether leave to amend should be granted, the district court has discretion to consider, *inter alia*, the apparent "futility of amendment," Foman v. Davis, 371 U.S.

at 182, 83 S.Ct. 227; see also Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir.1993) (per curiam). Amendment would likely be futile if, for example, the claims the plaintiff sought to add would be barred by the applicable statute of limitations. *See*, e.g., McGill v. Goff, 17 F.3d 729, 734 (5th Cir.1994). The court also has discretion to deny leave to amend "where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice" other parties, Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir.1990); see also Tokio Marine & Fire Insurance Co. v. Employers Insurance of Wausau, 786 F.2d 101, 103 (2d Cir.1986), or where the belated motion would unduly delay the course of proceedings by, for example, introducing new issues for discovery, *see, e.g.,* Ansam Associates v. Cola Petroleum, Ltd., 760 F.2d 442, 446 (2d Cir.1985). The district court's denial of leave to amend is reviewed only for abuse of discretion. *See*, e.g., Peterson v. Insurance Co. of North America, 40 F.3d 26, 31 (2d Cir.1994); United States v. Continental Illinois National Bank and Trust Co. of Chicago, 889 F.2d 1248, 1254 (2d Cir.1989).

1. The Refusal To Allow Assertion of the DCL §273-a Claims

Plaintiffs contend that their claims under DCL §273-a were not barred by the statute of limitations because at the time of plaintiffs' motion to file the Supplemental Complaint, those claims had not yet even accrued. For the reasons that follow, we agree that those claims had not yet accrued, but we conclude that this is not a basis for reversal.

Section 273-a provides that

> [e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

N.Y. Debt. & Cred. L. §273-a (emphasis added). To prevail on a claim under §273-a, a plaintiff must establish "(1) that the conveyance was made without fair consideration; (2) that the conveyor is a defendant in an action for money damages or that a judgment in such action has been docketed against him, and (3) that [the] defendant has failed to satisfy the judgment." Taylor-Outten v. Taylor, 248 A.D.2d 934, 935, 670 N.Y.S.2d 295, 296 (4th Dept.1998) (internal quotation marks omitted). Because "[t]he existence of an unsatisfied judgment is an essential

element of [§273-a]," Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir.1991) (internal quotation marks omitted); see also Frybergh v. Weissman, 145 A.D.2d 531, 531, 536 N.Y.S.2d 465, 466 (2d Dept.1988), the limitations period, which is six years, see N.Y. C.P.L.R. §213(1) (McKinney 1990), begins to run, at the earliest, on the date of the judgment, see Carey v. Crescenzi, 923 F.2d at 21.

The unsatisfied judgment at issue here is the judgment entered against Briggs in August 1997. That judgment had not yet been entered when plaintiffs moved in 1996 to file the Supplemental Complaint. Accordingly, the limitations period had not yet begun to run, and we agree with plaintiffs that the district court erred in viewing their DCL §273-a claims as time-barred.

Two factors, however, persuade us that that error does not warrant reversal. First, plaintiffs did not make their present nonaccrual argument with respect to the §273-a claim before the magistrate judge. Nor did they make any timely presentation of that argument to the district judge, for it was not mentioned to Judge Trager in their objections to the magistrate judge's September 1996 Order. To the contrary, plaintiffs' statement of their objections to the magistrate judge's statute-of-limitations ruling asserted, without any exception for claims under §273-a, that "the statute of limitations on a claim for fraudulent transfers is measured from the date of the

transfer." (Letter from Sidney Bender to Judge Trager, dated October 23, 1996, at 1.) Plaintiffs made no mention of their §273-a nonaccrual contention until January 1997, when they unsuccessfully asked the district court to certify statute-of-limitations issues to this Court. Accordingly, plaintiffs waived their nonaccrual objection to the magistrate judge's ruling.

Second, we are disinclined to remand for the court to exercise pendent jurisdiction over this state-law claim because all of the federal claims have now been dismissed.

> The decision to exercise pendent jurisdiction is vested in the sound discretion of the district court. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-28, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) .... The discretion is limited, however, by the consideration that "[n]eedless decisions of state law should be avoided...." *Id.* at 726

Fay v. South Colonie Central School District, 802 F.2d 21, 34 (2d Cir.1986) (reversing district court's exercise of pendent jurisdiction as abuse of discretion where dismissal of federal claim was required and state-law questions were unsettled). In United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), the Supreme Court stated that "if it appears that the state issues

substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals," id. at 726-27, 86 S.Ct. 1130; see also id. at 726, 86 S.Ct. 1130 ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); 28 U.S.C. §1367(c) (expressly authorizing district court, in actions commenced after December 1, 1990, see Judicial Improvements Act of 1990, Pub.L. No. 101-650, 104 Stat. 5089, 5114, to "decline to exercise supplemental jurisdiction" over a state-law claim over which it has no independent jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction").

Given that plaintiffs did not timely raise their §273-a nonaccrual argument in the district court, that all federal issues have now been disposed of, and that the §273-a claims are substantially different from the federal claims that have been adjudicated, we conclude that it would be inappropriate to remand to the district court for the belated introduction and litigation of these state-law claims in federal court.

2. The Other Proposed Claims

Plaintiffs also challenge the district court's rejection of their theories as to why their proposed claims under other DCL sections were timely. We see no error in the district court's rulings with respect to those claims. Plainly, most of the claims were based on transactions that occurred more than six years prior to plaintiffs' motion to amend. Further, as to the 1990 payments made less than six years prior to the motion, the district court stated that even if those payments themselves could be considered fraudulent conveyances within the limitations period, the court would not allow plaintiffs to add those claims, given, *inter alia*, the belated timing of the motion and the fact that discovery would have to be reopened. We see no abuse of discretion in that ruling.

Moreover, even if we concluded that the district court's views of the timeliness of the proposed claims under DCL §§273, 274, and 276 were flawed, we would decline, for the reasons just discussed with respect to §273-a, to remand for the district court to adjudicate those state-law issues now that all federal issues have been resolved.

We note that plaintiffs, concerned with the possible preclusive effect of the district court's denial of leave to file the Supplemental Complaint, contend that the district court could not properly consider whether their new claims would be barred by the statute of limitations without first determining that

it had subject matter jurisdiction over those claims. For that proposition, plaintiffs rely on Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir.1963) (en banc). Their reliance is misplaced, however, as their contention misperceives both the nature of the decision on a motion for leave to amend and the nature of pendent jurisdiction.

Arrowsmith did not involve a plaintiff's motion to amend the complaint; nor did it involve pendent jurisdiction. Rather, it concerned a defendant's motion to dismiss the complaint on the grounds of, *inter alia*, lack of personal jurisdiction and failure to state a claim on which relief can be granted. We held that the court should have resolved the jurisdictional issue, determining whether it had the power to adjudicate the action against that defendant, before dismissing for failure to state a claim, because a dismissal on the latter ground has preclusive effect. Neither of those grounds, however, was discretionary. If the action was flawed in either respect, the court was required to dismiss.

In contrast, as discussed above, both the decision whether to exercise pendent jurisdiction and the decision whether to allow a new pleading are committed to the sound discretion of the district court, *see, e.g.*, United Mine Workers v. Gibbs, 383 U.S. at 725-28, 86 S.Ct. 1130 (pendent jurisdiction); Foman v. Davis, 371 U.S. at 182, 83 S.Ct. 227

(amended pleading), and we have suggested that generally the denial of leave to bring in new defendants does not have preclusive effect with respect to the claims against those defendants, see Northern Assurance Co. of America v. Square D Co., 201 F.3d 84 (2d Cir.2000). In any event, both types of decision in question here are discretionary, and we see no requirement, in circumstances such as these, that either branch of discretion be exercised before the other.

## CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

## APPENDIX B
## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of October two thousand.

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Grace

v. Dkt No: 98-9618

Genser

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A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Lorraine Grace et. al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that

heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**
ROSEANN B. MACKECHNIE, Clerk

By: /s/
Beth J. Meador
Administrative Attorney

Filed U.S. Court of Appeals for the Second Circuit, October 26, 2000

ROSEANN B. MACKECHNIE, CLERK

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

----------x

LORRAINE GRACE, et al.,

Plaintiff,

- against -

ROBERT ROSENSTOCK,
ROBERT GENSER, et. al.,

Defendant.

----------x

**JUDGMENT**
**85-CV-2039 (DGT)**

An order of the Honorable David G. Trager, United States *District Judge*, having been filed on August 5, 1997, no just reason for delay, entering judgment in favor of plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,288.00; entering judgment in favor of plaintiffs class against defendant Briggs Leasing Corporation in the amount of $4,028,000.00; continuing this action by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in

bankruptcy on or before September 29, 1997; directing tha the action in Supreme Court of the State of New York, County of New York, Index No. 96/600193, is moot only as to defendant Robert Rosenstock; and, directing that the action by plaintiff as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot, it is

**ORDERED and ADJUDGED** that final judgment is hereby entered in favor of the plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,288.00; that final judgment is hereby entered in favor of plaintiffs class against defendant Briggs Leasing Corporation in the amount of $4,028,000.00; that this action shall continue by plaintiffs class against Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in bankruptcy on or before September 29, 1997; that the action in Supreme Court of the State of New York, County of New York, Index No. 96/600193, is moot only as to defendant Robert Rosenstock; and, that the action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of

petitioners"shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot.

**DATED**: Brooklyn, New York
August 12, 1997

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/
James Giokas
Chief Deputy Clerk

Filed Clerk's Office
U.S. District Court EDNY
August 15, 1997

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

LORRAINE GRACE, et al., Plaintiffs,

-against-

ROBERT ROSENSTOCK, et al., Defendants.

---

**FINAL ORDER AND JUDGMENT**
**85-CV-2039 (DGT)**

**WHEREAS**, plaintiffs class and defendants Robert Rosenstock and Briggs Leasing Corporation have entered into the attached July 31, 1997 Stipulation ("Stipulation");

**IT IS HEREBY ORDERED** this 4th day of August, 1997, as follows:

1. Judgement shall be entered in favor of the plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,288.

2. Since a Default Judgment on the issue of Liability was entered against defendant Briggs Leasing Corporation, judgment shall be entered in favor of the plaintiffs class against the defendant Briggs Leasing Corporation in the amount of $4,028,000.

3. Notwithstanding the above, this action shall continue by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in bankruptcy on or before September 29, 1997.

4. Under the circumstances, there is no just reason for delay and the entry of final judgment is hereby expressly

directed as against defendants Robert Rosenstock and Briggs Leasing Corporation.

5. The action in the Supreme Court of the State of New York, County of New York, Index No. 96/600193, is moot only as to defendant Robert Rosenstock.

6. The action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot.

/s/_____
David G. Trager
United States
District Judge

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

LORRAINE GRACE, et al., Plaintiffs,

-against-

ROBERT ROSENSTOCK, et al., Defendants.

---

**STIPULATION OF SETTLEMENT**
**85-CV-2039 (DGT)**

**IT IS HEREBY STIPULATED AND AGREED** this 31 day of July, 1997 between Leventritt Lewittes & Bender, the attorneys for the plaintiffs class, and Robert Rosenstock, defendant appearing pro se, that the parties in the above captioned action have agreed to settle this action on the following terms and conditions:

1. Judgement shall be entered in favor of the plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,288 for damages, pre-judgment interest, attorneys' fees and costs.

2. Since a Default Judgment on the issue of Liability was entered against defendant Briggs Leasing Corporation, the parties agree that a judgment shall be entered in favor of the plaintiffs class against the defendant Briggs Leasing Corporation in the amount of $4,028,000 for damages, pre-judgment interest, attorneys' fees and costs.

3. Notwithstanding the above, this action shall continue by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in bankruptcy on or before September 29, 1997.

4. The action in the Supreme Court of the State of New York, County of New York, Index No. 96/600193, is moot only as to defendant Robert Rosenstock.

5. The action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot.

6. As between the plaintiffs class and defendant Robert Rosenstock it is deemed that plaintiffs' motion to supplement and amend their complaint against Robert Rosenstock pursuant to Rule 15 of the Federal Rules of Civil Procedure has been granted and all the claims covered by that Supplemental and Amended Complaint against Robert Rosenstock are resolved by the Final Order and Judgment to be entered herein.

7. Defendant Robert Rosenstock agrees to appear and give testimony in any case in this court or New York State Supreme Court, New York County relating to the issues in the Amended Complaint and the proposed Supplemental and Amended complaint in this case and in the complaint in the New York State Supreme Court (Index No. 96/600193) provided that Leventritt Lewittes and Bender as attorneys for the plaintiffs pays for or provides (at Leventritt Lewittes and Bender's option) a round trip ticket (not to exceed $750 dollars for each round trip) to Robert Rosenstock (if out of New York State).

Leventritt Lewittes & Bender

By: /s/_____
Sidney Bender

A Member of the Firm
Attorneys for the Plaintiffs Class

/s/_____
Robert Rosenstock
Defendant Pro Se
3800 Hillcrest Drive, Apt. 1215
Hollywood, Florida 33021
(954) 981-1263

Briggs Leasing Corporation

By:/s/_____
Robert Rosenstock
3800 Hillcrest Drive, Apt. 1215
Hollywood, Florida 33021
(954) 981-1263

**LEVENTRITT LEWITTES & BENDER**

August 1, 1997

By Facsimile: 561-483-7911
Robert Rosenstock
3800 Hillcrest Drive, Apt. 1215
Hollywood, Florida 33021

Re: Grace v. Rosenstock

Dear Robert:

This is to confirm our telephone conversation today that with respect to paragraph 7 of the Stipulation of Settlement, in the event you are required to spend more than one night in New York, then I will pay you $200 per night for your out of pocket expenses for hotel and food, for each additional night you are required to be in New York pursuant to that paragraph 7.

Very truly yours,
/s/
Sidney Bender

AGREED TO THIS FIRST DAY OF
AUGUST, 1997
/s/
Robert Rosenstock

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------x

OLIVER R. GRACE,
et al.,

Plaintiffs,

- against -

ROBERT ROSENSTOCK, et al.

Defendants

----------x

MEMORANDUM OF
DECISION AND ORDER
CV-85-2039(MAC)

February 1986

CONSTANTINO, D.J.

Defendants Briggs Leasing Corporation and Briggs Acquisition Corporation move this court to stay proceedings in this court to permit the appraisal proceedings in the Supreme Court, Nassau County entitled *Halperin et al. v. Briggs Leasing Corp./Index #9973* to go forward. We note that the

New York State Supreme Court on October 7, 1985 already stayed the State action pending resolution of this court's determination. Although we recognize a federal court's discretion to stay proceedings pending the disposition of a State court action we decline to do so in this action. As the Court of Appeals in *Alpert v. 28 William Street Corp.*, 63 N.Y. 2d 557, 568, 483 N.Y.S. 2d 667 stated: "The pursuit of an appraisal proceeding generally constitutes the dissenting shareholder's exclusive remedy (*see* Business Corporation Law, §623 subd[k]; *see also Breed v. Barton*, 54 N.Y. 2d 82, 85). An exception exists however, when the merger is unlawful of fraudulent as to that shareholder, in which event an action for equitable relief is authorized." (Business Corporation Law §623 subd[k]. *Alpert v. 28 William Street Corp.*, *supra* at 568. The exception 623k applies to the instant action as alleged in the plaintiff's complaint. Since the State Supreme Court granted the stay of the appraisal action under the authrity of *Alpert v. 28 William Street Corp.*, *supra*, the equitable action in this court will proceed. *See also Pellman v. Cinerama*, 503 F. Supp. 107 (S.D.N.Y. 1980).

Defendants Briggs Leasing Corporation and Briggs Acquisition move pursuant to Fed. R. Civ. P. 12(c) for an order granting judgment on the pleadings. Defendants' motion is denied in the entirety. Plaintiffs sufficiently plead a cause of action for fraud. The complaint adequately pleads a section

10(b) claim. Plaintiffs' ability to prove their claim at trial is a question of fact which is not appropriate for resolution at this stage of the litigation. Plaintiffs have adequately plead fraud in connection with the merger under 10(b) and have standing to maintain the instant action.

SO ORDERED.

/s/

U. S. D. J.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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OLIVER R. GRACE, LORRAINE GRACE, MORGAN H. GRACE and GERALD I. WHITE, Trustee of the JOHN E. GRACE TRUST, individually, and as stockholders of BRIGGS LEASING CORPORATION, suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

Plaintiffs,

-against-

ROBERT ROSENSTOCK, ROBERT GENSER, EDWARD ROSENSTOCK, BRIGGS LEASING CORPORATION and BRIGGS ACQUISITION CORPORATION

Defendants.

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**AMENDED COMPLAINT -- CLASS ACTION**

**85 Civil 2039 (MAC)**

Plaintiffs, by their attorneys, LEVENTRITT LEWITTES & BENDER, as and for their Complaint herein allege as follows:

1. This is a civil action - derivative, class, and individual - for equitable and other relief. It is based on violations of Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78(j), Rule 10b-5 promulgated thereunder, N.Y. Bus. Corp. Law §605(a) and the exception stated in §623 subd. (k) of N.Y. Bus. Corp. Law, N.Y. General Bus. Law §352-c (the "Martin Act") and for breach of fiduciary obligation under New York State law. As to all defendants, this Court has federal question jurisdiction under §27 of the Securities Exchange Act of 1934 and pendent jurisdiction over the State claims.

CLASS ACTION ALLEGATIONS

2. Plaintiffs were shareholders of BRIGGS LEASING CORPORATION, a New York corporation ("BRIGGS") at the time of the transactions herein complained of. The class of shareholders plaintiffs seek to represent were also shareholders of BRIGGS at the time of the transactions herein complained of. There are approximately 190 members of the class, thus the class is so numerous that joinder of all is impracticable.

3. The principal transaction herein complained of involves the freeze-out merger on or about February 26, 1985, of the minority shareholders of BRIGGS by the self-interested majority defendant shareholders, without business purpose and at a totally unfair price (hereinafter referred to as "The Merger"). That purported merger was invalid, is subject to rescission and plaintiffs continue as constructive owners of an equity interest in BRIGGS.

4. The class members are identically situated – their claims involve the same transactions. Thus there are questions of law and fact common to the class. Plaintiffs' claims are typical of the claim of the class and plaintiffs will fairly and adequately protect the interest of the class – they have similar interests with those of the class and their counsel is experienced and able to conduct class action litigation. This action falls within the Federal Rules of Civil Procedure, Rule 23(b) (1) (A), b(1) (B) and 23 (b) (2) and b(3).

5. Common questions of law and fact predominate over questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy; this case is ideal for class action status. Rule 23(b) (3) has been used quite frequently in cases, such as this, involving securities frauds. This action alleges misrepresentations and omissions from the proxy

statement dated January 28, 1985. On information and belief all the members of the class received that proxy statement. This action involves the same principal transaction – the freeze-out merger of all BRIGGS minority shareholders at an inadequate price.

COUNT I

6. As of February 25, 1985, BRIGGS had 595,728 shares of common stock outstanding. Plaintiffs were the beneficial owners of 7,476 common shares of BRIGGS, or approximately 1.25% of BRIGGS outstanding stock.

7. BRIGGS is a New York corporation which at all relevant times was engaged in the business of leasing automobiles, primarily Cadillac and Oldsmobile automobiles, to individuals and businesses. At all relevant times, BRIGGS was a public corporation, the shares of which have been traded over-the-counter. On information and belief, as of February 25, 1985, BRIGGS had approximately 190 shareholders. At the time of the purported merger, the reported book value of its common stock was approximately $2.75 a share.

8. Prior to January 10, 1985, the majority shareholders of BRIGGS were defendants ROBERT ROSENSTOCK ("ROSENSTOCK"), his father, EDWARD ROSENSTOCK and ROBERT GENSER ("GENSER"), who, in total, owned 72%

of BRIGGS. ROSENSTOCK was a Vice President and Director of BRIGGS. GENSER was Vice President, Secretary-Treasurer and Director of BRIGGS. EDWARD ROSENSTOCK was Chairman of the Board, Chief Executive Officer and President of BRIGGS.

9. ROSENSTOCK and GENSER, majority shareholders, directors and officers of BRIGGS, recently formed BRIGGS ACQUISITION CORPORATION ("BAC"), a New York corporation, for the sole purpose of facilitating the freeze-out merger between BRIGGS and BAC.

10. On January 10, 1985, ROSENSTOCK and GENSER contributed all of their respective shares of BRIGGS (384,350 and 29,961 shares, respectively) then owned by them to BAC, and received one share of common stock of BAC in exchange for each share of BRIGGS contributed by them. The sole shareholders of BAC are ROSENSTOCK and GENSER.

11. On January 14, 1985, ROSENSTOCK purchased 17,516 shares of BRIGGS from defendant EDWARD ROSENSTOCK, his father, for $1.50 per share. On the same date, ROSENSTOCK contributed all 17,516 shares of BRIGGS to BAC in exchange for 17,516 shares of BAC. Thus, BAC owned approximately 72% of the issued and outstanding

shares of the common stock of BRIGGS immediately prior to the merger.

12. By Notice dated January 28, 1985, BRIGGS mailed a letter to its shareholders notifying them that a special meeting would be held on February 25, 1985, for the purpose of voting upon the merger of BAC into BRIGGS, with BRIGGS the surviving company to be wholly-owned by ROSENSTOCK and GENSER. The Notice informed the shareholders, that "irrespective of the vote" of the minority shareholders, approval of the merger was assured because the (self-interested) majority stockholder BAC, solely owned by ROSENSTOCK and GENSER, was in favor of the merger and had agreed to vote same.

13. The Notice of Special Meeting informed the shareholders that they would be bought out at $1.50 per share upon consummation of the merger. That price is totally unfair and fraudulent.

14. Attached to the Notice of Special Meeting was a Proxy Statement which contained numerous material misrepresentations and omissions, specified herein below.

15. At the shareholders' meeting on February 25, 1985, plaintiffs voted against the merger. Based solely on BAC's vote of their shares

in BRIGGS, the merger proposal was purportedly adopted.

16. On February 26, 1985, the merger purportedly became effective, with ROSENSTOCK and GENSER remaining as the sole shareholders of BRIGGS. ROSENSTOCK now purportedly owns 93% of the common stock of BRIGGS and GENSER now purportedly owns the remaining 7%.

17. BAC is a shell corporation formed by the individually named defendants for the sole purpose of providing a vehicle by which the individually named defendants would freeze out the minority shareholders of BRIGGS. The merger had no business purpose, but rather was effected for the sole purpose of increasing the personal wealth of ROSENSTOCK and GENSER. The Proxy Statement (p. 6), stated:

> "it is proper for ROSENSTOCK and GENSER to have the total ownership and receive all of the earnings of the Company... ROSENSTOCK and GENSER believe they should receive the full benefit of any future increase in the equity and earnings of the Company."

18. The Proxy Statement employed by BRIGGS, BAC and the individually named defendants, in order to effectuate the merger, knowingly and intentionally constituted a device,

scheme and artifice to defraud BRIGGS minority shareholders. For the purpose of forcing the BRIGGS minority shareholders to surrender, and thereby sell, their stock pursuant to the merger plan, and thereby forgo the real value of said securities and a continuing interest in BRIGGS, the Proxy Statement contained numerous untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, all in violation of Section 10(b) of the Act and Rule 10b-5 promulgated thereunder: To wit:

a. The Proxy Statement failed to disclose that the individually named defendants voted for and approved the merger because it was a necessary step in the consummation of a plan and scheme to divert to the individually named defendants, as sole shareholders of BRIGGS, the real property owned by BRIGGS which, once diverted to their sole control, was and is to be quickly developed into an office building-supermarket complex for the personal benefit of the defendants. BRIGGS owns 67,000 square feet, and leases an additional 23,000 square feet under a long term lease, of prime realty located at 777 Northern Boulevard, Great Neck, New York, the value of which substantially exceeded the book value set forth in the financial statements appended to the Proxy Statement. Contrary to the representation in the Proxy Statement, these

development plans were well advanced and will be promptly implemented absent the relief sought herein.

b. The Proxy Statement represents the value of the real estate owned by BRIGGS as being $883,503. In fact, and undisclosed, that realty is worth at today's market value in excess of $2 million.

c. The Proxy Statement represented that the BRIGGS Board of Directors, *i.e.*, the individually named defendants, voted for and approved the merger because they concluded that it was proper for defendants GENSER and ROBERT ROSENSTOCK to own 100% of BRIGGS and receive all its income since they personally guaranteed the company's debt incurred by purchasing automobiles. On information and belief, and undisclosed, the primary guarantor of such debts until January, 1985, was CHARLOTTE ROSENSTOCK. GENSER and ROBERT ROSENSTOCK never guaranteed such debts until recently when they did so for the first time in order to add an illusory business purpose and justification for the purported merger. In fact, and undisclosed, such guarantees, principally running to General Motors Acceptance Corporation ("General Motors"), are in a real sense meaningless since such debt is fully collateralized by chattel mortgages on the purchased automobiles. It is extremely unlikely that such guarantees would ever be called by General Motors.

Rather than a security protection for General Motors, General Motors insists on such guarantees to insure continuity of ownership of entities in its distribution system. In any event, even if the guaranties were called, defendants GENSER and ROBERT ROSENSTOCK come nowhere near having the financial wherewithal to meet them, a fact well known to General Motors and the defendants.

d. On information and belief, the Proxy Statement fails to reveal offers from third parties to purchase BRIGGS real estate for sums substantially in excess of its reported value of $883,503. In particular, one such offer was for $1.5 million in addition to a continuing one-half interest in the property as redeveloped by the proposed buyer.

e. The Proxy Statement fails to disclose any description of the defendants' existing plans to develop the BRIGGS real estate, including estimates of the income to be generated by such development.

f. On information and belief, the Proxy Statement fails to disclose an offer made by JAMES HALPERIN in January, 1985, to acquire all the stock of BRIGGS for $3 a share.

g. On information and belief, the Proxy Statement fails to disclose the existence and value of legal claims of BRIGGS against the individually named defendants for repeated and long

standing diversions of corporate funds for their own personal use and benefit. In this regard, the Proxy Statement misstates that in 1984, EDWARD ROSENSTOCK, ROBERT ROSENSTOCK and GENSER received cash compensation of $78,000, $70,000 and $60,000, respectively. In 1984 their actual, and unreported, compensation vastly exceeded those amounts as it did in the years preceding 1984. BRIGGS has been used routinely by the individually named defendants as a personal cash box to defray tax-free the expenses incurred in pursuit of their opulent lifestyles. For example, BRIGGS cash generated in various ways from BRIGGS operations and/or corporate credit cards are and have been used to pay the expenses of EDWARD ROSENSTOCK incurred in maintaining two residences (New York and Florida), in commuting by air weekly between such residences, for dues and expenses for the Westview and Hillcrest Country Clubs (neither of which is used for business related purposes), both highly expensive golf clubs located in the State of Florida, and for his restaurant, limousine and clothing bills. BRIGGS cash and corporate credit cards are and have been used by ROBERT ROSENSTOCK, a bachelor, (i) to defray the expenses he has incurred and incurs in acquiring, maintaining and furnishing no less than two luxury residences in New York (apartments at 79th Street and Park Avenue, and a home in Great Neck, Long Island); (ii) to acquire and maintain membership in at least two expensive country clubs located in Florida (none of which is

used for business related reasons); (iii) to defray his extravagant travel, restaurant and entertainment expenses; (iv) to annually purchase in cash literally thousands of dollars of clothes made to his order by Fiorvanti Tailors of New York where the price of a custom made suite starts at approximately a modest $2,500. The exact amount of these tax-free diversions of BRIGGS monies for the six years prior to the commencement of this action is presently unknown to the plaintiffs, will be determined during the discovery process, and is now estimated to be approximately $750,000 per year.

h. On information and belief, the Proxy Statement fails to disclose and value the legal claims of BRIGGS based on the illegal and improper diversion of corporate opportunities by the individually named defendants, i.e., the acquisition by them of Ross Chevrolet Cadillac Oldsmobile, Inc. ("Ross") and Belgrave Oldsmobile, Inc. ("Belgrave"), both of which BRIGGS was in a position to acquire, and, with respect to Ross, the acquisition of which BRIGGS actually helped finance.

(i) On information and belief, in 1981 it was brought to the attention of the individually named defendants that Ross was available for acquisition at an extremely attractive price. Rather than present this attractive corporate opportunity to BRIGGS, which, had it been under a management not burdened by the conflicts of interest present here, would have been eager to

make the acquisition; EDWARD ROSENSTOCK and ROBERT ROSENSTOCK, acting out of a desire to personally benefit defendants themselves and in breach of their fiduciary duties to BRIGGS and its minority shareholders, arranged for the acquisition of Ross by ROBERT ROSENSTOCK personally using, in part, assets of BRIGGS to finance the acquisition. At the present time, ROBERT ROSENSTOCK and GENSER own all of its stock. Since the acquisition, the individually named defendants have caused BRIGGS to do business with Ross for their own personal financial benefit.

(ii) On information and belief, in 1983 it came to the attention of the individually named defendants that Belgrave was available for acquisition. Rather than present this attractive corporate opportunity to BRIGGS, which, had it been under the control of a management not burdened with the conflicts of interest present here, would have been eager to make the acquisition; the individually named defendants, for the personal financial benefit of defendants, ROBERT ROSENSTOCK and GENSER, and in breach of their fiduciary duties to BRIGGS and its minority shareholders, arranged for Belgrave to be acquired personally by ROBERT ROSENSTOCK and GENSER. In particular, that acquisition was not offered to BRIGGS because Belgrave was and is the owner of a large parcel of undervalued real estate

which the individually named defendants plan to develop for their own personal financial gain. Since that acquisition, Briggs has been caused by the individually named defendants to do business with Belgrave for the personal financial benefit of ROBERT ROSENSTOCK and GENSER. i. On information and belief, the Proxy Statement failed to disclose that during the period June 1984 through February 1985, the individually named defendants acquired BRIGGS stock in private transactions at prices in excess of $1.50.

j. The Proxy Statement failed to reveal that the Special Meeting of Shareholders of February 25, 1985, was invalidly called and could be of no legal effect. Section 605(a) of the New York Business Corporation Law (McKinney Supp. 1984) (the "BCL") mandates that a notice of a shareholders' meeting to approve a merger refer to and disclose the shareholders' statutory rights under the BCL's appraisal provisions. The Notice employed by the defendants to convene the meeting of February 25, 1985, contained no such reference or disclosure.

k. The Proxy Statement misrepresents that BRIGGS liquidation value is less than its going concern value when just the opposite is the case, in view of the actual market value of BRIGGS realty and the value of its unasserted claims against the individual defendants.

19. Defendants, by cashing out the minority shareholders at $1.50 per share, have placed a total value on BRIGGS' entire equity at less than $900,000. In no event, would the individual defendants sell their equity interest at $1.50 per share. Defendants, knowing that the fair market value of BRIGGS' total equity is greatly in excess of $900,000, are deliberately, and willfully deceiving and defrauding the minority stockholders of BRIGGS.

20. By virtue of the foregoing, equitable relief was, and is, available to the plaintiffs, individually and derivatively, under the exception stated in Sec. 623 Subd. (k) of the Business Corporation Law of New York and under its law applicable to breach of fiduciary duties.

21. The misrepresentations and omissions specified above would have been of actual significance in the deliberations of a reasonable disinterested director of Briggs and were, therefore, material. The likely ability to enjoin the merger under New York law supplies the causal link between the material misrepresentations and non-disclosures on the one hand, and injury to Briggs and plaintiffs on the other; and, of course, said deception was in connection with the purchase or sale of securities. Hence, the freeze-out merger was in violation of Sec. 10(b) and Rule 10b-5.

COUNT II

22. Plaintiffs repeat and reallege the allegations contained in Paragraphs 2 through 30, as if fully set forth herein.

23. Defendants as controlling stockholders of BRIGGS and the individual defendants as directors of BRIGGS have breached their fiduciary duty to BRIGGS and to the minority stockholders of BRIGGS under New York State's common law and the exception to §623 subd. (k) of the BCL by forcing this deceptive and fraudulent merger upon the minority shareholders. Equitable relief, including rescission of the merger is appropriate, individually and derivatively.

COUNT III

24. Plaintiffs repeat and reallege the allegations contained in Paragraphs 2 through 21, and if fully set forth herein.

25. Defendants have violated New York General Business Law, Section 352-c, (the "Martin Act") by forcing this deceptive and fraudulent merger upon the minority stockholders.

COUNT IV

26. Plaintiffs repeat and reallege the allegations contained in paragraphs 2 through 21 as if fully set forth herein.

27. By virtue of the foregoing, the defendants have violated BCL §605(a) and the purported merger is therefore without effect and should be rescinded.

COUNT V

28. Plaintiffs repeat and reallege the allegations contained in Paragraphs 2 through 21, as if fully set forth herein.

29. The cause of action is also derivative on behalf of BRIGGS by reason of damages sustained by BRIGGS, caused by defendants' acts set forth in Paragraphs 18 (g) and (h).

30. Since the individual defendants, who have enriched themselves at the expense of BRIGGS and misappropriated BRIGGS' corporate opportunities, are all directors of BRIGGS, it would be futile to make a demand on those same directors to sue themselves on behalf of BRIGGS based on all the derivative claims in this Count.

31. Plaintiffs have no adequate remedy at law.

32. On May 20, 1985, plaintiffs herein commenced an action as Petitioners in the Supreme Court of the State of New York, County of Nassau, against BRIGGS LEASING CORPORATION, Respondent, to fix the fair value of Petitioners' shares as dissenting shareholders under §623 of the Business Corporation Law. Therein, Petitioners requested that prosecution of the appraisal proceeding be held in abeyance pending the final determination of this Federal action.

33. There is a related (individual) action filed in this Court entitled "ADRIENNE ROSENSTOCK HALPERIN, et. al., Plaintiffs, against ROBERT ROSENSTOCK, et. al., Defendants (Index No. 85 Civil 1258, Constantino, J.).

WHEREFORE, plaintiffs pray for an order and judgment:

I. That the action insofar as brought as a class action may be maintained as such.

II. That the merger aforesaid be set aside; or

III. That the terms of the aforesaid merger be reformed so that they are just, fair and equitable;

IV. That defendants account for the damages suffered by BRIGGS and the profits and benefits enjoyed by the individual defendants by reason of the wrongs set forth in Count V; and

V. That the Court give such other, further, and different relief as may be just, including damages, together with costs, disbursements and a reasonable fee for plaintiffs' attorneys.

Dated: July 1, 1985

**LEVENTRITT LEWITTES & BENDER**

By: /s/
A Member of the Firm
Attorneys for the Plaintiffs
1205 Franklin Avenue
Garden City, New York 11530
(516) 742-4250

In arriving at the appraised values, we have given consideration to all items influencing value. Included are the items of location, existing and projected competition, continued demand, current and anticipated market conditions, current mortgage rates, actual income, expenses and lease terms, government rules and regulations, income rates for similar properties, as well as the rates of return of competitive properties and investments.

As of February 26, 1985, the date of valuation, we estimate the market value of the subject property's fee owned land area to be:

**TWO MILLION TWO HUNDRED SIXTY-FIVE THOUSAND DOLLARS ($2,265,000.00)**

As of February 26, 1985, the date of valuation, we estimate the market value of the subject property's leasehold estate, subject to the existing ground lease, to be:

**TWO HUNDRED SIXTY-FIVE THOUSAND DOLLARS**
**(265,000.00)**

A report of 48 pages is attached hereto and made part hereof, and the valuation is expressly made subject to the conditions and comments appearing on such pages.

**Very truly yours,**

**GOODMAN-MARKS ASSOCIATES, INC.**

| /s/ | /s/ |
|---|---|
| Bernard Goodman, MAI, CRE<br>President<br>Certified General Real Estate Appraiser<br>New York Certificate #460690 | Anthony C. Iaccio, MAI<br>Senior Vice President<br>Certified General Real Estate Appraiser<br>New York Certificate #464645 |

**GOODMAN-MARKS ASSOCIATES, INC.**
**REAL ESTATE**

November 16, 1987

Mr. Louis J. Avallone
Vice President
Bank Leumi Trust Company of New York, NY 10119
121 Middle Neck Road
Great Neck, New York 11021

X X X

As of October 14, 1987, the properties had appraised values of:

1) 124 South Middle Neck Road -
FOUR MILLION ONE HUNDRED TWENTY-FIVE THOUSAND DOLLARS ($4,125,000.00)

2) 777 Northern Boulevard –
Fee Position:
FOUR MILLION TWO HUNDRED THOUSAND DOLLARS ($4,200,000.00)
Leasehold Interest:
SIX HUNDRED THOUSAND DOLLARS ($600,000.00)

3) 732 Northern Boulevard –
ONE MILLION ONE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($1,175,000.00)

A report of 63 pages is attached hereto and made part hereof, and the valuation is expressly subject to the conditions and comments appearing on such pages.

Very truly yours,
GOODMAN-MARKS ASSOCIATES, INC.
/s/_____
Bernard Goodman, SREA
President

/s/_____
Patricia Roche, CSA
Assistant Vice President

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

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BANK LEUMI TRUST COMPANY OF NEW YORK, Plaintiff,

-against-

BRIGGS LEASING CORPORATION, et al., Defendants.

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**VERIFIED COMPLAINT**
**14095/90**

Plaintiff BANK LEUMI TRUST COMPANY OF NEW YORK, ("Bank Leumi"), by its attorneys WARSHAW BURSTEIN COHEN SCHLESINGER & KUH alleges that:

55. Bank Leumi assigned the Remaining Mortgage and Remaining Note to European American Bank by separate agreement entered contemporaneously therewith.

**VERIFIED JUNE 14, 1990**